92-97

No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC., COMAIR, INC., MIDWAY AIRLINES (1987), INC., USAIR, INC., AMERICAN AIRLINES, INC., and UNITED AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD OF AERONAUTICS and THE KENT COUNTY DEPARTMENT OF AERONAUTICS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Commerce Clause and the federal aviation laws permit the Nation's airports to assess user fees on airlines and passengers that are far in excess of the airports' own costs, that charge the airlines substantially more than their fair share of those costs, and that deliberately discriminate against interstate airlines in favor of local aviation.

2. Whether the Commerce Clause is automatically rendered inapplicable to an area of commerce whenever the Congress takes any action at all to regulate that area.

PARTIES TO THE PROCEEDINGS

Petitioners Northwest Airlines, Inc., Simmons Airlines, Inc., COMAIR, Inc., Midway Airlines (1987), Inc., USAir, Inc., American Airlines, Inc., and United Airlines, Inc. were plaintiffs in the District Court and appellants in the Court of Appeals for the Sixth Circuit.[1] The County of Kent, Michigan, the Kent County Board of Aeronautics, and the Kent County Department of Aeronautics were defendants in the District Court and appellees in the Court of Appeals. The Airport Operators Council International was an *amicus curiae* in the Court of Appeals.

Petitioner Northwest Airlines, Inc. states that its parent companies are NWA, Inc. and Wings Holdings, Inc., and that it has no nonwholly owned subsidiaries.

Petitioner Simmons Airlines, Inc. states that its parent companies are AMR Eagle, Inc. and AMR Corporation, and that it has no nonwholly owned subsidiaries.

Petitioner COMAIR, Inc. states that its parent company is COMAIR Holdings Inc., and that it has no nonwholly owned subsidiaries.

Petitioner Midway Airlines (1987), Inc. states that its parent company is Midway Airlines, Inc., and that it has no nonwholly owned subsidiaries.

Petitioner USAir, Inc. states that its parent company is USAir Group, Inc., and that its subsidiaries are Pacific Southwest Airmotive, USAM Corp. and USAir Fuel Corporation.

Petitioner American Airlines, Inc. states that its parent company is AMR Corporation, and that DFW Terminal Corporation is a nonwholly owned subsidiary. All

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[1] USAir, Inc. petitions both on behalf of itself and as the successor to Piedmont Aviation, Inc., which was also a plaintiff in the District Court.

other subsidiaries are either wholly owned by American Airlines, Inc. or jointly owned with AMR Corporation.

Petitioner United Airlines, Inc. states that its parent company is UAL Corporation, and that it has no nonwholly owned subsidiaries.

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Northwest Airlines, Inc., Simmons Airlines, Inc., COMAIR, Inc., Midway Airlines (1987), Inc., USAir, Inc., American Airlines, Inc., and United Airlines, Inc., petition this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The three separate opinions of the divided panel of the Court of Appeals for the Sixth Circuit (Judges Kennedy, Nelson, and Contie) are reported at 955 F.2d 1054 and are reprinted in the Appendix to this petition ("App.") at 1a. The opinion of Chief Judge Merritt dissenting

from the denial of *en banc* rehearing is reported at 955 F.2d 1066 and is reprinted at App. 62a. The opinion of the District Court (Judge Bell) granting judgment to respondents is reported at 738 F. Supp. 1112 and is reprinted at App. 23a. The opinions of the District Court denying petitioners' motions for summary judgment and granting partial summary judgment to respondents are unreported and are reprinted at App. 41a, 47a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 3, 1992. That court's order denying a timely filed petition for rehearing and suggestion for rehearing *en banc* was entered on April 16, 1992. App. 60a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides in pertinent part that "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . . ."

Section 7(a) of the Anti-Head Tax Act of 1973, Pub. L. No. 93-44, 87 Stat. 90, 49 U.S.C. § 1513 (as amended by Pub. L. No. 97-248, tit. V, § 532, 96 Stat. 701 (1982)) provides, in pertinent part:

> (a) *Prohibition; exemption.* No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . . .
>
> (b) *Permissible State taxes and fees.* [N]othing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section . . . ; and nothing in this section shall prohibit a state (or political subdivision thereof . . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Section 2210 of Title 49, U.S.C. provides, in pertinent part:

> (a) *Sponsorship*
>
> As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—
>
>> (1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination . . . ;
>>
>> (9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible . . . ;
>>
>> (12) all revenues generated by the airport, if it is a public airport . . . will be expended for the capital or operating costs of the airport . . . .

STATEMENT OF THE CASE

This case presents two important questions. The first concerns the "reasonableness" of user fees assessed by the Nation's airports on airlines and their passengers. More specifically, this case asks the Court to decide whether airport user fees that consistently generate huge surpluses far in excess of the airports' own costs, that charge the airlines substantially more than their fair share of those costs, and that deliberately discriminate against interstate airlines in favor of local aviation, are

"reasonable" within the meaning of the federal Anti-Head Tax Act ("AHTA"), 49 U.S.C. § 1513. A unanimous Seventh Circuit (Judges Posner, Flaum, and Coffey) has already held that such fees are patently unreasonable. *See Indianapolis Airport Authority* v. *American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984). In so holding, the Seventh Circuit relied on the Commerce Clause standard for reasonableness established by this Court in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972).

Yet in this case, a divided panel of the Sixth Circuit upheld airport fees virtually identical to those disapproved by the Seventh Circuit, and did so notwithstanding that the Sixth Circuit agreed that the AHTA's "reasonableness" requirement should be interpreted according to this Court's *Evansville* standard. The result is that, as the Chief Judge of the Sixth Circuit indicated in his dissent from denial of *en banc* rehearing, the Circuits are now split over an issue of great consequence to the millions of members of the traveling public, to the hundreds of airports in this country, and to the surviving members of the ailing airline industry.

The second question presented by this case is potentially of even greater importance: whether the Commerce Clause of the U.S. Constitution is rendered inapplicable to all State regulation—no matter how burdensome upon or discriminatory against interstate commerce—whenever Congress has taken at least some regulatory action in the area. That is the holding of the Sixth Circuit in this case. It is not only in conflict with other Circuits addressing the issue, but it is directly contrary to the controlling precedents of this Court. If this view of the Constitution were allowed to stand, it would not only effectively eviscerate the Commerce Clause, but would also produce numerous anomalous results Congress could not have intended. For all these reasons, further explained below, certiorari should be granted.

A. The Airport's User Fees

The Kent County International Airport, located near Grand Rapids, Michigan ("the Airport"), assesses fees on the following primary users of that Airport: (1) the commercial airlines that serve Grand Rapids ("the Airlines"); (2) local general aviation (primarily corporate and privately owned aircraft); (3) the concessionaires (rental car agencies, parking lot operators, etc.); and (4) the Airlines' passengers. The Airport assesses fees on the first three groups directly, and on the fourth group, the Airlines' passengers, indirectly. Those fees are assessed as follows.

First, the Airport determines its own costs associated with providing benefits to each of the first three groups (Airlines, local aviation, and concessions). It does so, however, by assuming that only the Airlines and local aviation benefit in any way from the Airport's airside activities (*i.e.*, from costs associated with runways, landing operations, etc.). App. 27a. It makes this assumption even though the Airport concessions are entirely dependent on the commercial air operations for the creation of their customer flow. Indeed, the Airport makes this assumption even though there obviously would be no customer flow to the concessions at all were it not for the substantial airside activities.

Having made this assumption, the Airport then charges nearly all the costs of the airside activities (as well as the costs of the passenger terminal) to the Airlines, including the share of those costs that should be assigned to the concessions. Next, the Airport charges local aviation only 20% of the costs that the Airport's own allocation method shows are attributable to local aviation. That is to say, once the Airport determines the amount of its costs it believes are fairly allocable to the Airlines and to local aviation, it assesses the Airlines 100% of their allocated share, but assesses local aviation only 20% of its allocated share. Finally, having thus overcharged

the Airlines for their fair share of the airside activities (because the Airlines are also charged for the concessions' share of those activities), and having also deliberately undercharged local aviation for its fair share, the Airport finishes by charging the concessions a fee based on a flat percentage (10%) of their gross sales to customers—a fee that is necessarily passed on to the Airlines' passengers because those passengers *are* the concessions' customers. *See* App. 27a-29a.

The Airport's fee methodology produces three significant anomalies:

- first, year in and year out the methodology requires the Airlines and their passengers to pay user fees vastly in excess of the Airport's actual costs;
- second, it requires the Airlines to pay for virtually all the costs of airside activities and more than three-quarters of the costs of the passenger terminal, even though the concessions are directly benefitted by the services and facilities that generate those costs; and
- third, the methodology specifically and deliberately discriminates against the Airlines in favor of local aviation.

These anomalies were not only predictable, but inevitable, given a methodology that essentially attempts to recover the Airport's costs at least twice over—once by charging nearly all the airside activity and passenger-terminal costs to the Airlines (including the concessions' share of those costs) and a second time by charging a 10% sales-volume fee that is passed on to the Airlines' passengers. Taken together, these anomalies have produced multi-million-dollar cumulated surpluses for the Airport—surpluses far in excess of the amounts the Airport could ever need, even taking into account all expenses, all debt service, and all possible further capital expenditures and improvements.

B. The Statutory and Constitutional Challenges to the Fees

The commercial airlines that serve the Grand Rapids Airport challenged the described fee methodology in federal district court in Michigan, alleging that it violates both federal statutory law and the Commerce Clause.[1] The Airlines relied primarily on the Anti-Head Tax Act, 49 U.S.C. § 1513, which prohibits airports from imposing any "fee, . . . directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce," other than "reasonable" fees imposed on "aircraft operators for the use of airport facilities." 49 U.S.C. § 1513(a), (b) (1988). The Airlines also argued that the Airport's methodology places an unreasonable burden on interstate air travel and impermissibly discriminates against interstate air travel in favor of local, intrastate travel—all in violation of the Commerce Clause.

In support of these arguments, the Airlines relied principally on three authorities: (1) this Court's decision in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc., supra*; (2) the AHTA and its legislative history; and (3) the Seventh Circuit's decision in *Indianapolis Airport Authority* v. *American Airlines, Inc., supra*.

1. *Evansville*

In *Evansville*, this Court held that the Commerce Clause forbids airports from levying fees on airport users[2] unless the fees are (1) "based on some fair approximation of use or privilege for use"; (2) not dis-

[1] Jurisdiction in the trial court was conferred by 28 U.S.C. § 1331. The Airlines also challenged the methodology under Michigan law, a challenge that is not before this Court.

[2] The Court deemed it irrelevant whether such fees are levied on passengers directly, or indirectly through charges on airlines. 405 U.S. at 714-15.

criminatory as between interstate and intrastate users; and (3) not "excessive in relation to costs incurred by the taxing authorities." 405 U.S. at 716-20. Airport fees are considered excessive under the third test if they "would do more than meet . . . past, as well as current, deficits." *Id.* at 720. The Court found this third requirement consistent with Congress' intention to allow airports "to levy charges designed to help defray the costs of airport construction and maintenance," and thereby "'make the airport as self-sustaining as possible.'" *Id.* at 721 (quoting Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219, 49 U.S.C. § 1718(8) (current version at 49 U.S.C. § 2210(a)(9))). Finding that the passenger head taxes involved in *Evansville* satisfied all three of these tests, the Court approved them.

2. The AHTA

Reacting to the *Evansville* decision, Congress in 1973 enacted the AHTA, which supplemented *Evansville* with an even *stricter* standard that prohibits all fees (whether or not permissible under *Evansville*) except certain fees exempted from statutory regulation. Specifically, for purposes of this case the AHTA outlawed all passenger head taxes, whether direct or indirect, except "reasonable" fees imposed on "aircraft operators for the use of airport facilities." The history of this enactment[3] makes clear that Congress intended to authorize *only* fees that were to be used for aviation-related purposes and were necessary to make the airports self-sustaining, and that any other fees would produce unacceptable "financial windfalls" for those airports. *See* S. Rep. No. 93-12, 93rd Cong., 1st Sess., *reprinted in* 1973 USCCAN 1434, 1446-51.

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[3] For a discussion of the legislative history of the AHTA, see *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7, 8-10 (1983).

3. *Indianapolis*

Following enactment of the AHTA, the Seventh Circuit in *Indianapolis* reviewed fees almost identical to those presented here. There, as here, the airport had allocated none of the costs of air activities to concessions; there, as here, the airport assessed sales-volume fees on concessions that were largely passed on to the airlines' customers; there, as here, the airlines were assessed fees designed to recover all costs allocated to them, while general aviation was assessed fees designed to recover significantly less than its allocated costs; and there, as here, the airport's rates and fees yielded the airport income substantially in excess of its total costs. *See* 733 F.2d at 1265, 1271.

For two reasons, the Seventh Circuit panel unanimously concluded that the resulting fees assessed on the airlines were invalid. Judge Posner, writing for himself and Judge Coffey, concluded that the fees were not "reasonable" within the meaning of the AHTA because:

> When concession rentals . . . that are more than three times the cost that [the airport] itself allocates to the concessions are added to the airline user fees . . . *the result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers, and is therefore unreasonable* . . . .

Id. at 1268 (emphasis supplied).

Judges Posner and Coffey furthermore determined that, as a practical matter, the airport's refusal to consider concession surpluses when assessing appropriate airline fees would allow an airport to tax passengers indirectly, and thus evade the requirements of the AHTA. *Id.* at 1268-60. Thus, Judge Posner wrote, if the total fees assessed on airlines and their passengers (whether directly or indirectly) are far in excess of the airport's costs, the inevitable result will be reduced passenger travel or reduced ticket prices (and thus reduced airline

revenues). *Id.* at 1268. Finally, the majority found the airport's fees necessarily unreasonable because of their discriminatory treatment of interstate airlines vis-a-vis local aviation. *Id.* at 1271.

In a separate opinion, Judge Flaum likewise found the airport's airline fees unreasonable, but for a different reason—because the airport charged the whole of the costs of the airside activities to the airlines, and none to the concessions.[4] Judge Flaum held such fees unreasonable because:

> The dependence of the nonaeronautical users [*i.e.*, the concessions] on the airlines to produce customers means that those users receive a substantial benefit from the airlines. *The costs of producing that benefit, however, are borne entirely by the airlines.*

Id. at 1276 (emphasis supplied). Accordingly, a unanimous Seventh Circuit invalidated the fees.

C. The Divided Sixth Circuit's Approval of the Fees

After a bench trial, the District Court in this case upheld nearly identical fees, even though it was "troubled by such large surpluses generated by the Airport." App. 39a.[5] A divided panel of the Sixth Circuit affirmed, through three separate opinions that together expressly rejected every ground upon which the *Indianapolis* court relied.

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[4] Judge Flaum declined to address the AHTA issue, holding that the fees were unreasonable under state law, which likewise imposed a "reasonableness" requirement on airport fees. *Id.* at 1274. However, he did not find that the federal reasonableness requirement should be interpreted differently, preferring not to reach that issue. *Id.* at 1274 n.5. Nevertheless, he did observe that the AHTA prohibits excessive overall airport revenues. *Id.*

[5] The District Court struck down one aspect of the Airport's fees (overnight aircraft parking fees), but this holding was not appealed by the Airport and is therefore not presented for review in this Court.

Thus, first, the panel (through Judge Kennedy's lead opinion) rejected the holding of the *Indianapolis* majority that fees which are out of all proportion to airport costs—and which therefore produce substantial surpluses at the expense of the traveling public—are necessarily "unreasonable" under the AHTA. Instead, the panel reasoned that because concession fees "are not within the scope of the AHTA," the huge surpluses are irrelevant to whether the fees charged to the Airlines are unreasonable. App. 9a-10a.

Second, the panel rejected Judge Flaum's view that fees such as those involved here are unreasonable because they allocate no share of the Airport's air-activity costs to concessions, even though the concessions reap substantial benefits from those activities. App. 11a-12a. The panel's only answer to Judge Flaum's holding was that the Airlines had not proved that *100%* of the *terminal building* common areas were charged to the Airlines. The panel thus completely missed the Airlines' and Judge Flaum's point, which is that *none* of the airside costs are allocated to the concessions, with the necessary result that the Airlines' fair share of those costs is overstated.

Finally, Judges Contie and Nelson rejected the *Indianapolis* court's holding that the fees in this case unlawfully discriminate against the Airlines in favor of local aviation. These two Judges found the discrimination "reasonable" and so upheld it. App. 18a-20a. Judge Kennedy dissented on this point, as she agreed with the *Indianapolis* court that "[t]his is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act." App. 13a (quoting 733 F.2d at 1271).

The panel struck down only one portion of the challenged fees: Judges Kennedy and Contie agreed with the Airlines that it was unreasonable under the AHTA to allocate all Airport costs of crash, fire, and rescue ("CFR") services to the Airlines, as those costs also produce a "substantial benefit" to general aviation and the

concessions. App. 13a-14a.[6] Judge Nelson dissented on this point. App. 21a-22a. Nevertheless, although a majority of the panel assessed the reasonableness of the CFR cost allocation according to the benefits actually received by the various airport users, it inexplicably refused to apply that same standard to the allocation of other costs, *i.e.*, it refused to acknowledge that concessions received substantial benefits from the airside activities that created their customer flow, but were allocated none of the costs of those activities.

Having thus rejected the Airlines' contentions under the AHTA, the court then refused to even *consider* their contentions under the Commerce Clause. App. 16a-17a. Notwithstanding that this Court entertained precisely such a challenge in *Evansville*, the Sixth Circuit held that such scrutiny was no longer available once Congress had enacted the AHTA. Specifically, the court held that Commerce Clause review is available only if "Congress had taken no other action to regulate the area." App. 16a. In so holding, the court ignored both *Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982)—which holds that state legislation remains subject to challenge under the Commerce Clause unless Congress has "expressly stated" its desire to immunize that legislation—as well as the fact that Congress enacted the AHTA to set a *stricter* standard than that applied under the Commerce Clause, not to *prevent* application of the Clause as in *Evansville*.

The panel denied rehearing and the Sixth Circuit denied rehearing *en banc*. App. 60a. However, Chief Judge Merritt dissented from the denial of rehearing *en banc*, explicitly noting the need for review in this Court. Recognizing that the panel's opinion created a "direct conflict with the Seventh Circuit" on "an important issue," the Chief Judge stated that "[b]efore we require

[6] Oddly, this was the only issue which the airlines in *Indianapolis* had *lost*; thus, the panel below succeeded in creating a split in the circuits on every issue it decided.

the Supreme Court to resolve this conflict in the circuits, we should hear the case *en banc*." App. 62a. He also stressed that the panel's holding necessarily affected "airports across the country" and therefore involved issues upon which "[t]here is a great need for uniformity." *Id.*[7]

REASONS FOR GRANTING THE WRIT

This case presents all three of the most important grounds warranting review by this Court: (1) the decision below has created a direct conflict in the Circuits; (2) the decision is in conflict with this Court's own precedents; and (3) the case plainly presents significant issues of nationwide importance. Together, these grounds present a compelling case for certiorari.

I. THE CONFLICT IN THE CIRCUITS

As noted by Chief Judge Merritt, the decision below is squarely in conflict with the Seventh Circuit's decision in *Indianapolis*. Both cases involved an identical fee-setting methodology—a methodology by which the local airports generated huge surpluses far in excess of their costs of operation, debt service, and capital expenditures—all at the expense of commercial airlines and the traveling public. The airports did so by (1) allocating none of the costs of airside activities to concessions (even though the concessions obviously benefit enormously from those activities); (2) assessing fees against the airlines and their passengers that are out of all proportion to the airlines' fair share of the airport's operating costs; (3) systematically discriminating against the interstate airlines in favor of local aviation; and (4) year in and year out

[7] Although the Chief Judge's opinion was addressed specifically to the CFR issue (upon which the Airlines prevailed), his reasoning is equally applicable to the other issues in the case. That is because every issue faced by both the Sixth and Seventh Circuits was decided under an identical "reasonableness" standard; furthermore, all such issues are applicable to airports across the country and as to each there is a great need for uniformity.

generating fee revenues far in excess of the airports' needs to remain self-sustaining.

The Seventh Circuit said such fees are not "reasonable" under the AHTA; the Sixth Circuit in this case said they are. The conflict could not be more direct.[8] Moreover, each of the five opinions in these two cases displays a different understanding of the AHTA reasonableness requirement.

Furthermore, the Sixth and Seventh Circuit decisions are not isolated incidents. Rather, courts have been grappling with these issues ever since *Evansville*, and no

[8] The divided Sixth Circuit panel purported to distinguish part of its decision from the *Indianapolis* case on the ground that the airport in that case had a "locational monopoly" while the Kent County airport does not. App. 10a. This purported distinction is legally irrelevant, factually wrong, and could in no event justify the whole of the Sixth Circuit's decision. The AHTA requires fees at *all* airports to be reasonable, whether or not those airports happen to possess monopoly power. The *Indianapolis* court found that airport's fees to be unreasonable *not* because the airport had monopoly power, but because its fees were far in excess of its costs. 733 F.2d at 1268. The court referred to monopoly power solely as an explanation for the airport's *ability* to impose its excessive fees, not as a *prerequisite* to a finding that the fees were unreasonable. *Id.* at 1267-1269.

Moreover, the factors the *Indianapolis* court relied on to detect the presence of monopoly power—excessive surpluses and the absence of comparable alternative airports—are in fact presented in this case. *See id.* at 1267. The lack of any real alternatives is demonstrated here by the fact that the service at the airports nearest to the Kent County airport is much more limited than that at Kent County, and that travellers must incur significant additional costs to reach those airports. The existence of other airports an hour away does not destroy Kent County's monopoly; rather, as Judge Posner recognized, it merely limits it. *Id.* at 1269. Finally, and in any event, even if monopoly power helped explain the excessive fees on airlines and their passengers, this power has nothing to do with—and cannot justify—either the unreasonable allocation of costs between airlines and concessions or the blatant discrimination against the airlines in favor of local aviation.

two opinions have rested on the same grounds. For example, in *Raleigh-Durham Airport Authority* v. *Delta Air Lines, Inc.*, 429 F. Supp. 1069 (D.N.C. 1976), the court held that an airport may refuse to allocate costs of airside activities to concessions only if none of the airport's concession revenues are ever used to finance airside activities. On the other hand, in *City and County of Denver* v. *Continental Air Lines, Inc.*, 712 F. Supp. 834 (D. Colo. 1989), the court held that an airport may assess fees on airlines for costs related only to their present use of *existing* facilities, but not for the construction of future facilities. Yet in *American Airlines, Inc.* v. *Massachusetts Port Authority*, 560 F.2d 1036 (1st Cir. 1977), the court held that an airport may validly charge airlines for facilities that are not in fact put into use. It is plain that such conflicts will continue, and multiply, until the Court gives guidance and meets the "great need for uniformity" noted by Chief Judge Merritt. App. 62a.

In addition, the conflict noted by the Chief Judge is not the only one presented by this case. In holding that the mere enactment of the AHTA foreclosed Commerce Clause review of the challenged fees, the court placed itself in direct conflict with *Alamo Rent-A-Car, Inc.* v. *City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992) and *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Authority*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991). In both of those cases, the courts held that airport fees were permissible under the AHTA, but then also subjected those fees to Commerce Clause review.[9] Moreover, the Sixth Circuit's broad holding that

[9] The Sixth Circuit attempted to distinguish *Sarasota-Manatee* on the grounds that the plaintiff in that case (a concessionaire) "was not disputing a tax or regulation in an area where Congress had acted . . . ." App. 17a. However, not only is this an incorrect statement of the applicable legal standard (*see infra* at 18-19), but both cases involved precisely the same issue—whether a regulation that is held to be permissible under the AHTA must nevertheless still pass muster under the Commerce Clause.

Commerce Clause review is available only when Congres has "taken no other action to regulate the area" cannot be reconciled with the holdings of other circuits. *See National Solid Wastes Management Ass'n* v. *Alabama Dep't of Environmental Management*, 910 F.2d 713, 721-22 (11th Cir. 1990) (federal hazardous waste laws do not demonstrate "unmistakably clear" intent to approve otherwise invalid state regulation in the area), *modified*, 924 F.2d 1001, *cert. denied*, 111 S. Ct. 2800 (1991); *Middle South Energy, Inc.* v. *Arkansas Public Serv. Comm'n*, 772 F.2d 404, 414-15 (8th Cir. 1985) (federal utility regulation does not foreclose Commerce Clause review of state utility laws), *cert. denied*, 474 U.S. 1102 (1986). Thus, on both of the questions presented here—the definition of "reasonable" airport fees and the availability of Commerce Clause review for those fees—there is clear, pervasive conflict in the Circuit Courts.

II. THE CONFLICT WITH THIS COURT'S PRECEDENTS

The Sixth Circuit is not only in conflict with other Circuit Courts, it is also in direct conflict with the controlling precedents of *this* Court. Thus, first, the Sixth Circuit inexplicably failed to apply the analysis set forth in *Evansville*, even after recognizing that that precedent was controlling under the AHTA. *See* App. 11a. And, second, the panel completely ignored this Court's holdings that Commerce Clause review must be undertaken unless Congress "expressly states" otherwise with an "unmistakably clear" intent.

Indeed, the fees in this case plainly violate all three *Evansville* tests—they deliberately discriminate between interstate and intrastate users,[10] they do not fairly approximate each user's receipt of beneficial services, and they are plainly excessive in relation to the Airport's actual costs of the services. In the face of these three *Evansville* violations, it is difficult to understand how the Sixth Circuit could nevertheless have deemed the fees "reasonable." [11]

[10] This Court has recently re-emphasized the nearly *per se* invalidity of such discriminatory regulation. *See Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2014 (1992) (facially discriminatory regulation "is typically struck down without further inquiry" and "'[a]t a minimum . . . invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives'") (quoting *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979)); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Department of Natural Resources*, 112 S. Ct. 2019, 2023-24 (1992) (applying same standard); *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 799-802 (1992) (same).

[11] The court's failure to follow *Evansville* cannot be justified by its holding that concession fees *per se* are not regulated by the AHTA. *See* App. 9a. The airlines have never argued—neither here nor in *Indianapolis*—that concession fees are regulated by the AHTA. Rather, they have argued that under the AHTA the fees imposed *on them* must be reasonable and that they are not reasonable where, as here, those fees (1) allocate all the costs of airside activities to them, and none to concessions, (2) discriminate against them in favor of local aviation, and (3) assess fees on them and their passengers far in excess of the Airport's costs. Moreover, because, as Judge Posner noted, the concession fees affect the total cost of travel, they necessarily affect the passengers' purchasing decisions and consequently the Airlines' revenues. *See* 733 F.2d at 1268. As this Court has recently emphasized, local aviation regulation must be measured by its *actual economic effects* on airline ticket prices, regardless whether the regulation directly regulates those prices. *See Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2039-40 (1992).

Furthermore, Congress' concern over the effect of fees on the overall travel cost to the public is also demonstrated by 49 U.S.C. § 2210(a)(1), which requires that any airports receiving federal development grants "be available for public use on fair and reasonable terms and without unjust discrimination." Just as this Court in *Evansville* relied on the predecessor to § 2210 when evaluating airport fees under the Commerce Clause, it is clear that Congress intended the AHTA to be read in conjunction with § 2210. *See* S. Rep. No. 93-12, 93rd Cong., 1st Sess., 1973 USCCAN 1434, 1455 ("the two actions must be viewed together and . . . neither should stand alone without the other").

It is even more difficult to understand how the court, having found that the challenged fees did not violate the AHTA, could then refuse even to *consider* the merits of the Airlines' separate claim under the Commerce Clause. This constitutional claim was crucial to the Airlines' case because, even if the Sixth Circuit was right to deny the AHTA claim on the ground that that statute is inapplicable to concession fees—a point with which the Airlines strongly disagree (*see supra* n.11)—the Commerce Clause obviously *does* apply to such fees. *See, e.g., McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 241 (1980) (Commerce Clause embraces all activities having any effect on interstate commerce). Yet the Sixth Circuit, citing *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), held that "courts should only undertake a Commerce Clause review of a tax or regulation if Congress had taken no other action to regulate the area." App. 16a. Finding that the AHTA constituted such "action," the court determined that the Commerce Clause was rendered completely inapplicable.

The Sixth Circuit's holding is clearly *not* the law. Rather, as this Court reaffirmed in *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982), the principle recognized in *Merrion* applies only where Congress' "'intent and policy' to sustain state legislation from attack under the Commerce Clause" was "'*expressly stated*'" in the legislation at issue. *Id.* at 960 (emphasis supplied) (quoting *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982)).

More recently, the Court reiterated that such intent *cannot be implied*, but rather Congress must "affirmatively contemplate otherwise invalid state legislation" and its "intent must be unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 91-92 (1984). *Accord, Wyoming*, 112 S. Ct. at 802 ("Congress must manifest its unambiguous intent"); *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986) ("An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation . . . ."). In each of these cases, the Court entertained a Commerce Clause challenge despite the fact that Congress had taken "some action" to regulate the particular area of commerce, because Congress did not *expressly* indicate that it intended that action to override Commerce Clause protections.

Obviously, the AHTA does not evince any such congressional intent. Rather, far from being a situation in which Congress acted "expressly" to *approve* otherwise unconstitutional activities as *valid*, its entire purpose in the AHTA was to apply an even stricter standard than *Evansville*. Congress can hardly be thought thereby to have "expressly" approved any activity which is in fact unreasonably burdensome to interstate commerce. On the contrary, the plain language of § 1513(b)—particularly the authorization of only "reasonable" user fees—makes clear that Congress intended for the AHTA to have *no effect* on the legality of those activities exempted from regulation. As this Court has consistently held, provisions such as § 1513(b) merely limit the scope of federal pre-emption, and do not thereby manifest an intent to approve otherwise invalid legislation. *See Wyoming*, 112 S. Ct. at 802 (construing similar provision); *New England Power*, 455 U.S. at 341 (same). *See also Aloha Airlines*, 464 U.S. at 12 n.6 (intent of § 1513(b) is to limit pre-emptive scope of AHTA).[12] In sum, the decision below is in direct conflict with this Court's precedents on both of the questions presented by this case.

III. THE NATIONAL IMPORTANCE OF THIS CASE

Finally, the case is of nationwide importance with regard to both of the questions presented. Indeed, with

[12] This Court's treatment of the AHTA also confirms that that statute was not intended by Congress to preclude Commerce Clause inquiry. *See Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1 (1986) (state activity that is permitted by AHTA subjected to Commerce Clause analysis).

regard to the kind of fees imposed in this case, it is clear, as Chief Judge Merritt wrote, that the Sixth Circuit's decision will necessarily affect "airports across the country." App. 62a. And if that decision is allowed to stand —and the excessive fees at Grand Rapids proliferate— the impact on the traveling public and the airline industry will be profound. This is so for several reasons.

As this Court recently noted in *International Society for Krishna Consciousness* v. *Lee*, 60 U.S.L.W. 4749 (U.S. June 26, 1992), the airports in this country have in recent years become big business: they are now large "commercial establishments" that are "funded by user fees and designed to make a regulated profit." *Id.* at 4752. And, even though their purpose is "the facilitation of passenger air travel" (*id.*), their *modus operandi* (as shown by this case and the *Indianapolis* case) is to assess the highest possible fees on airlines and their passengers. It is undeniable that it is the airlines and their passengers that pay those fees inasmuch as virtually all who come to the airports do so for purposes related to air travel. *See id.* at 4750, 4752.

The pervasive impact of these fees is staggering. In 1989 alone, the total operating profit for 190 of the Nation's largest airports (which together served less than 60% of that year's passenger demand) exceeded $1,072,000,000—virtually all funded by airlines and their passengers. *See* American Association of Airport Executives, *1990 Survey of Airport Rates and Charges* (aggregated surpluses for reporting airports); Federal Aviation Administration, Air Carrier Activity Information System (1989 enplanement data). In *Krishna Consciousness*, this Court referred to these profits as "regulated." 60 U.S.L.W. at 4752. But under the Sixth Circuit's decision it is hard to see how there is *any* limit on the fees and profits airports will be allowed to extract. And if the Sixth Circuit's decision is allowed to stand, it is inevitable that numerous other airports will soon follow with com-

parable fees of their own.[13] The profits for airports will thus continue to soar, the costs to the public will continue to increase, and the burden on interstate travel—the very thing the AHTA was designed to prevent—will grow worse.[14]

At the same time, the increased fees to the Airlines— and the resulting inevitable loss of ticket revenue (*see Indianapolis*, 732 F.2d at 1268)—will only exacerbate the airlines' already critical financial condition. Numerous large carriers (including Eastern Airlines, Continental Air Lines, Pan American World Airways, Trans World Airlines, America West Airlines, petitioner Midway Airlines, and Braniff) are currently in bankruptcy or have recently been liquidated. And virtually all the survivors are losing money. Indeed, in 1990 and 1991, the airline industry lost a staggering $3,921,002,000 and $1,869,974,000 respectively, while being directly charged over $3,407,397,000 in airport fees in 1991 alone. These fees

[13] At the time this Court upheld the head taxes at issue in *Evansville*, there were only five or six jurisdictions with such taxes. However, during the year following that decision, some 44 jurisdictions had adopted the tax, prompting passage of the AHTA. *See* Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182 and S. 38 Before the House Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess., at 64-67 (1973). A similar response will doubtless occur here. In addition, the decision below sends a clear signal to localities that it is now permissible to openly discriminate between local and interstate aviation—result that Congress and the Constitution both sought to prohibit.

[14] The legislative history of the AHTA makes clear that Congress forbade windfall-producing fees at airports regardless whether passengers or airlines ultimately paid those fees; for whether the passengers pay them directly, or they are "absorbed" by the airlines, or a "fare increase [has] to be implemented," in any event the "end result is to raise the cost of air travel." S. Rep. No. 93-12, 1973 USCCAN at 1451.

currently account for approximately 4.5% of the airlines' total operating costs.[15]

The impact of these fees is substantial, especially considering that even in the best of years the airline industry's profit margins are exceedingly slim. A margin of 2-3% is considered "good," and the airlines historically have been only half as profitable as the average company in other U.S. industries. *See* Air Transport Association of America, *1992 State of the U.S. Airline Industry: A Report on Recent Trends for U.S. Air Carriers* 5 (Mar. 1992). Moreover, airport fees have steadily increased at rates far above inflation, while the intensely competitive nature of the airline industry ensures that these increases cannot be recouped through ticket prices: between 1982 and 1991, airport fees rose by 76% while during the same period overall consumer prices rose by only 41% and average ticket prices by a mere 7%. *Id.* at 12, 15. In these circumstances, only a single major carrier (Southwest Airlines)—and not one of the petitioners in this case—is expected to earn a profit this year. *See* Stewart Toy & Seth Payne, *The Airline Mess*, Business Week 50, 51 (July 6, 1992).

The significance of this case, therefore, is that the excessive airport fees in this case have been imposed at a time when airports are thriving and airlines are failing, and when the inevitable result of such fees is to burden—if not stifle—interstate air travel. Indeed, the continued unchecked imposition of airport fees could mean the difference between solvency and insolvency for many airlines, especially if one considers the inevitable decrease

[15] *See* Air Transport Association of America, *Air Transport 1992: The Annual Report of the U.S. Scheduled Airline Industry* 17 (June 1992) (loss figures). The figures on airport fees and total operating costs have been aggregated by the Air Transport Association based on information submitted by the airlines on Department of Transportation Form 41. Airport fees include landing fees and terminal rental fees.

in passenger demand caused by the fees.[16] Moreover, the traveling public—whom Congress primarily sought to protect—must ultimately bear the brunt of these fees. In 1989 alone, over 482,860,000 trips were taken from 417 airports by passengers on the Nation's commercial airlines. On an average per-passenger basis, each of these trips contributed approximately $3.80 to the airports' total profits. *See* American Association of Airport Executives, *1990 Survey of Airport Rates and Charges* (aggregated surpluses for 190 airports); Federal Aviation Administration, Air Carrier Activity Information System (1989 enplanement figures). Thus, it is clear that the airport fees presented in this case will inevitably produce the very increase in air travel costs that Congress intended to prohibit. For all these reasons, the lower courts' conflict over the lawfulness of such fees raises a question of great national importance.

Finally, the Sixth Circuit's abdication of Commerce Clause review will have profound effects not only on all future challenges to airport fees, but also on the viability of judicial review over virtually *all* areas of interstate commerce. If constitutional scrutiny exists only when "Congress ha[s] taken no other action to regulate the area," it is difficult to imagine *any* area where the Constitution would still be operative. For Congress has regulated almost *every* area of interstate commerce in some way, but only rarely does it "expressly state" its intention to approve activities that are considered unreasonably burdensome under the Commerce Clause. As this Court has emphasized, the requirement that Congress' intent be "unmistakably clear" is necessary "because of

[16] It has been estimated that a mere 2% reduction in the federal airline ticket tax (which has the same economic effect as airport fees) would result in an annual increase of 6.5 million passengers and would increase the airlines' revenues by $900 million and their net profit by $300 million. *See* Air Transport Association of America, *1992 State of the U.S. Airline Industry: A Report on Recent Trends for U.S. Air Carriers* 14 (Mar. 1992).

the important role the Commerce Clause plays in protecting the free flow of interstate trade . . . ." *Maine*, 477 U.S. at 138-39. In view of the pervasiveness of federal commerce regulation, the decision below completely nullifies that "important role" and permits all manner of burdensome state regulation regardless of Congress' intent. Such a result should not obtain without this Court's review.

CONCLUSION

For all the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 90-1811, 90-2117

NORTHWEST AIRLINES, INC.; SIMMONS AIRLINES, INC.; PIEDMONT AVIATION, INC.; COMAIR, INC.; MIDWAY AIRLINES, INC.; USAIR, INC.; AMERICAN AIRLINES, INC.; and UNITED AIRLINES, INC.,

Plaintiffs-Appellants,

v.

COUNTY OF KENT, MICHIGAN; THE KENT COUNTY BOARD OF AERONAUTICS; and THE KENT COUNTY DEPARTMENT OF AERONAUTICS,

Defendants-Appellees.

Argued Sept. 23, 1991

Decided Feb. 3, 1992

Douglas E. Wagner, Christopher C. Williams, Mark S. Bransdorfer (briefed), Warner, Norcross & Judd, Grand Rapids, Mich., Walter A. Smith, Jr. (argued), Hogan & Hartson, Washington, D.C., Malcolm C. Mallette (briefed), James G. McIntire, Krieg, DeVault, Alexander & Capehart, Indianapolis, Ind., for plaintiffs-appellants.

Richard A. Kay, Mark S. Allard (briefed), Varnum, Riddering, Schmidt & Howlett, W. Fred Hunting, Jr. (argued), briefed, Robert A. Buchanan, Law, Weathers & Richardson, Grand Rapids, Mich., for defendants-appellees.

Before KENNEDY and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

KENNEDY, Circuit Judge.

Northwest, Simmons, Piedmont Aviation, Comair, Midway, USAir, American and United Airlines dispute the landing fees, terminal building rental rates, carrying charges, and crash/fire/rescue charges assessed them at the Kent County International Airport serving Grand Rapids, Michigan. The Airlines also argue that surplus revenue generated by the fees charged non-airline concessions should be cross-credited to reduce the fees charged to the Airlines. For the reasons state below, we REVERSE and REMAND to the District Court to determine the proper allocation of fees between the Airlines and general aviation in regard to crash, fire and rescue costs. We AFFIRM the District Court's dismissal of the Airlines' claims under the Airport and Airway Improvement Act of 1982 and the Commerce Clause, its finding that the Airlines have no right to be cross-credited for concession revenues, the finding that the allocation of terminal rental fees between the Airlines and concessions were reasonable, and the finding that the method the airport used to assess airside operation fees for general aviation and the Airlines was reasonable.

I.

The Kent County International Airport ("Airport") is operated by the Kent County Aeronautics Board and the Kent County Department of Aeronautics ("defendants"), both departments of Kent County. The County is the owner and landlord of the Airport and its facilities. The Airport was originally financed by the issuance of general obligation bonds which were later retired through a tax levy. The Airport is a relatively small hub airport whose primary passengers consist of people with Western Michigan origins or destinations. The Airport is serviced by Northwest, Simmons, Piedmont Aviation, Comair, Midway, USAir, American and United Airlines ("Airlines").

The accounting methodology used by the Airport views the Airport as the landlord, and all users as tenants. This accounting system, developed by James C. Buckley, is known as the Buckley or compensatory "methodology" and is widely used by airports.[1] The system is designed so that the Airlines are only charged for the land costs, physical facilities and other expenses which can be directly allocated to them. When using this system, the Airport first determines the cost basis of the land and facilities. Next, the usage of all areas is calculated and the various users are assigned rents that reflect their usage level. The costs are primarily divided among three groups: the Airlines, non-airline concessions, and general aviation.[2] These users enter into leases with the Airport which establishes the fees and rates to be charged.

The Airlines and the Airport negotiated and agreed on the fees to be charged through December 31, 1986. In 1986, a new rate study resulted in increased fees and the Airlines and Airport could not reach an agreement. Finally, on March 10, 1988, the airport passed an ordinance which unilaterally increased the fees. On April 1, 1988, this case was filed challenging the ordinance rates and the rates charged subsequent to December 31, 1986.[3]

[1] *See* Report from James C. Buckley, *Fees for the Use of Public Aircraft Facilities and Rental for Passenger Terminal Premises, for Freight Terminal Premises, for Rentable Buildings, and for Ground Space: Kent County Airport*, (February 1969).

[2] The term "general aviation" encompasses corporate aircraft and privately owned aircraft that are not used for transportation of military, public passengers, or cargo. The District Court found that over 160 general aviation craft are based at the Kent County Airport. *Northwest Airlines, Inc. v. County of Kent, Mich.*, 738 F.Supp. 1112, 1114 (W.D.Mich.1990).

[3] The Airlines amended their complaint on May 9, 1988 and again on November 9, 1988.

The Airlines specifically dispute the landing fees of 70.21 cents per 1,000 lbs., the terminal building rental rates, the carrying charge, the fact that general aviation was not also charged based on their costs, and the Airport's allegedly excessive fund balance.

II.

Prior to the trial in this case, the District Court ruled on cross motions for summary judgment. The District Court held that the Airlines did have a private right of action under the Anti-Head Tax Act ("AHTA") and denied the Airport's motion for summary judgment. It also held, however, that the Airlines had no right of action under the Airport and Airway Improvement Act or the Interstate Commerce Clause of the United States Constitution. We agree with the District Court.

The defendants first claim that the Airlines are precluded from challenging the current rates in federal court under either the AHTA or Airport and Airway Improvement Act of 1982 ("AAIA") because they failed to exhaust their administrative remedies. The defendants argue that the Airlines must first raise any claims with the Secretary of Transportation under the AAIA before any claims may be made in the District Court. In *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court established four factors to be used in determining whether Congress intended to create an implied right of action. These factors are:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . .? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78, 95 S.Ct. at 2088 (quoting *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916)) (emphasis in original; citations omitted). The Supreme Court has placed increasing emphasis on the second factor—the intent of Congress. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979); *Niagara Frontier Transp. Auth. v. Eastern Airlines Inc.*, 658 F.Supp. 247 (W.D.N.Y.1987).

Several courts have found that the AHTA satisfies all the *Cort* factors and that a private right of action exists. *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir.1987); *Niagara*, 658 F.Supp. at 247. Most importantly, the intent of Congress to grant a private right of action seems inherent in the language of the statute satisfying the second *Cort* factor. The AHTA expressly prohibits states from levying "a tax, fee, head charge, or other charge, directly or indirectly . . . ." 49 U.S.C.A. App. § 1513(a) (West. Supp.1991). As noted by the First Circuit, this statute does not mention the Secretary of Transportation nor an administrative or judicial enforcement scheme like those created in similar statutes. *Interface Group*, 816 F.2d at 16. In addition, the other *Cort* factors are also met. Private enforcement furthers the purposes of the statute by ensuring that airlines will file claims that individuals may lack the time and expenses to pursue. The AHTA also clearly identifies the class to be protected. We find that the Airlines had no duty to exhaust administrative remedies as to the statutory claims made under section 1513.

The Airlines face different administrative requirements under 49 U.S.C.A. App. § 2210, the AAIA. A review of the *Cort* factors indicate that Congress intended that there would be no private right of action under section 2210.

The statute provides that assurances must be given to the Secretary of Transportation regarding the reasonable terms and rates of an airport development project. 49 U.S.C.A. App. § 2210 (West 1991); *Interface Group*, 816 F.2d at 15. This provision indicates that Congress intended to establish an administrative enforcement scheme.[4] The AHTA and the AAIA do not cover similar issues or provide similar remedies. The AHTA addresses state taxation of air commerce for which recovery of unreasonable taxation or fees would be the remedy. The AAIA, on the other hand, requires certain assurances to be made prior to approval of an airport development project. Failure to make these assurances would result in denial of the grant. For this reason, all claims against the defendants under the AAIA were properly dismissed for failure to exhaust administrative remedies.

Second, the defendants assert that the Airlines are estopped or have waived their rights to object to the methodology and fees adopted by the defendants. They base this argument on the Airlines' failure to protest the fees during the twenty previous years. As support, they point to a December 22, 1983 letter from John Sorensen of United Airlines, then serving as the negotiator for all the Airlines, which they claim acknowledges the reasonableness of the rates. The defendants' argument is without merit.

The complaint filed by the Airlines clearly states that the protested fees were reportedly adopted on March 10, 1988 and became effective on April 1, 1988. The past fees referred to in the complaint are only those fees assessed subsequent to the contract which expired on December 31, 1986. The assessed fees do not represent rates which were agreed upon after negotiation. Rather, they are fees which were charged during the negotiation period. None of the protested fees or the requested remedies involves fees assessed under past contracts. The Airlines are not precluded from bringing a judicial challenge to rates because in the past they agreed to different assessed rates. The rates agreed to in the past are the result of negotiations between the Airlines, the County, and the Airport. *Northwest Airlines, Inc. v. County of Kent, Mich.*, 738 F.Supp. 1112, 1114 (W.D.Mich.1990). Only in 1988, when negotiations were unproductive, were these claims brought.

Finally, defendants argue that the Airlines do not have standing to raise issues based on rates, fees or charges to passengers and other non-aeronautical users of the airport. Defendants assert that the Airlines must show a causal connection between the damages they claim and the defendants' acts. *See In Re Air Passenger Computer Reservation Sys.*, 727 F.Supp. 564, 568 (C.D.Cal.1989). While it is clear that section 1513 gives the airlines a private right of action, the private right of action given in the statute to passengers may not be asserted by the airlines. The legislative history of the AHTA recognizes that by banning unreasonable taxes on the carriage of air pastaxes from being passed on to the consumer. *See* S.Rep. No. 12, 93d Cong., 1st Sess., *reprinted in* 1973 U.S.Code Cong. & Admin.News 1434, 1451; *Interface Group*, 816 F.2d at 16. Thus, the airlines ensure fair rates in a situation where the charges may be passed through the

[4] The Airlines argue that they are entitled to claim the protection of section 2210 despite the language giving responsibility to the Secretary of Labor. They place reliance on *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 721, 92 S.Ct. 1349, 1357, 31 L.Ed.2d 620 (1972), which applies the predecessor to section 2210 in determining Congressional intent regarding airport fees. *Evansville* involved a suit by the airlines against an airport. The airlines in *Evansville*, protesting the fees being applied by the airport, filed suit claiming that the fees were an unconstitutional burden on interstate commerce. The predecessor to section 2210, 49 U.S.C.A. § 1718(a)(8), was referred to as evidence that Congress did not intend to deny or preempt state or local power to levy charges to defray the cost of an airport. No reference was made as to whether the airlines would have had a private right of action under section 1718.

airlines to the consumer. Individual consumers in these situations may not contest the charges because of financial or time constraints. However, this reasoning does not apply in cases where the charges are being assessed directly to the passengers or other airport users. In these cases, users feel the direct impact of the charges and many, such as the concessionaire, are capable of asserting the claims. For the above reasons, we find that the Airlines have no standing to assert the claims of the non-airline airport users or passengers.

III.

The AHTA prohibits the imposition of any fee on "persons traveling in air commerce or on the carriage of persons traveling in air commerce" which are unreasonable. 49 U.S.C.A. App. § 1513(a) (West Supp.1991). Reasonable fees on "aircraft operators for the use of airport facilities" are allowed.[5] The statute does not provide guidance for determining what constitutes a reasonable fee. The Seventh Circuit, in *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir.1984), held that fees "wholly disproportionate" to the costs of serving the airline and airline passengers were unreasonable. The plaintiffs have the burden of proving that the rates are unreasonable in light of the benefits conferred on them. *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972); *American Airlines, Inc. v. Massachusetts Port Auth.*, 560 F.2d 1036 (1st Cir.1977). Deference is given to the rates established by the state and administrative agencies as long as they act within a broad range of reasonableness. *Evansville*, 405 U.S. at 712-14, 92 S.Ct. at 1353-54.

[5] The text of section 1513 reads, in pertinent part,

(a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . . .

(b) . . . [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 U.S.C.A. App. § 1513 (West Supp.1991).

A. Reasonableness of the Rates Charged to Concessions

The Airlines' argument suggests that overall the rates and fees established under the ordinance are inherently unreasonable because they result in a substantial profit for the Airport. The District Court found that the Airport had over $9 million in reserves at the end of 1989. Concessions are all the non-aeronautical users: parking lot, car rentals, restaurants, motels, gift shops, advertising, and food services. The fees charged by the Airport to these concessions generate a surplus of $2 million per year and result in a large reserve. The Airport views this surplus as a "contingency" fee to be used at a later time. The Airlines assert that this profit is prohibited by the AHTA and should properly be used to reduce the charges to the Airlines.

Non-airline concessions are not within the scope of the AHTA. As noted by the District Court, the statute does not mention concessions. Rather, section 1513(b) permits airports to charge reasonable fees and charges from *aircraft operators*. The Seventh Circuit opinion on which the Airlines rely for their assertions is distinguishable. In *Indianapolis Airport*, the court held that an ordinance was unreasonable which disregarded airport concession revenues when establishing the airline rates and fees. Such a result, wrote Judge Posner, is "wholly disproportionate to the costs to the airport of serving the airlines and their passengers, and is therefore unreasonable. . . ." 733 F.2d at 1268. Judge Posner relied on two fac-

tors in *Indianapolis Airport* which distinguish that case from the one now before us. First, the Indianapolis airport serves in a monopoly environment. As judicially noticed by the District Court, Kent County Airport is located less than an hour and a half from two airports serviced by major airlines. This means that the passenger has some role in determining from which airport to travel. Second, the Seventh Circuit required the plaintiffs to prove that the rates imposed directly affected the airline or airline passengers and not other parties not parties to the case. As did the District Court, we find the reasoning articulated by the Colorado District Court in *City and County of Denver v. Continental Airlines, Inc.*, 712 F.Supp. 834 (D.Col.1989) persuasive:

> Persons affected by the rates, rentals and charges for the restaurants, gift shops, parking lots and rental cars, include persons who are not air passengers. These accessory uses of the airport may be considered amenities for air passengers and convenient for them, but no person traveling to, from or through Stapleton on United or Continental flights is required to park in the parking lot, rent a car, eat at a restaurant or buy a magazine. Those are all individual decisions driven by individual perceptions of need and economic values. That is not the case with respect to the use of the airport's runways, taxiways, and airline portions of the terminal area. There, the air passenger is captive and her purse is necessarily and directly affected by Denver's charges to the airlines for those uses. Stated differently, Denver's decision to operate concessions at a profit is not an exploitation of airline passengers who have the freedom of choice to use the amenities Denver has provided.

712 F.Supp. at 838-39. We find that the AHTA does not apply to charges assessed to non-airline concessions and agree with the District Court that the Airlines may not require the cross-credit of concession revenue surplus against their rates and fees.

B. Allocation of fair share costs to concessions

The Airlines were assessed nearly $2 million in fees for 1988. This figure includes 76% of the costs of the passenger terminal building. The remaining 24% of the costs are allocated to concessions including restaurants, hotel, baggage carts and lockers.[6] The cost allocation is based on floor space occupancy. The Airport asserts that the cost allocation of common space is made in the same proportion as the percentage of terminal space the user occupies exclusively. The Airlines respond that the Airport's cost allocation is unreasonable in violation of AHTA. The Airlines contend that the 76% allocation results in the Airlines paying for 100% of the public spaces. Appellant's Brief at 29 n. 46.

A fee assessed is reasonable as long as it is based on some fair approximation of the cost of providing the facilities and services, is relevant to the operation of the airport, and is not arbitrary and capricious, but is based on a uniform, fair and practical standard. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 712-14, 92 S.Ct. 1349, 1353-54, 31 L.Ed.2d 620 (1972), *quoting Hendrick v. Maryland*, 235 U.S. 610, 624, 35 S.Ct. 140, 143, 59 L.Ed.2d 385 (1915); *Massachusetts Port Auth.*, 560 F.2d at 1038. An assessment of costs for the common space need not depend on a district court's estimate of the benefits each renter derives from its customers' use of the common area. Although such a method would be a possible method for assessing costs, there is nothing in the Act that dictates that such a method *must* be used.

There is no support for the Airlines' assertion that they pay for 100% of the "public spaces" cost. The Airlines' expert, Richard Dompke, testified that while 100% of the baggage claim area costs are allocated to the Airlines, the costs of common areas surrounding the restaurant,

[6] Some of the concessions, such as telephones and advertising space, are allocated no costs at all.

cocktail lounge, gift shop, and game room, are assigned to all users of the terminal building "on an equitable basis." Dompke also testified that part of concourse A has been designated as a public area, and that for this area, 76% had been charged to the Airlines. R.E. No. 162, pp. 163, 164. The Airport's witness, John F. Brown, stated that the Airlines are not charged at all for the space that is roped off where passengers line up to get their ticket and check in their luggage. The lease signed by the parties indicates that an airline must pay a rental rate based on a square footage basis for the ticket wings, concourse level, holding rooms, lounges, and office space which it occupies. Rental of the baggage claim and tag circulation area is apportioned between the users of these areas. Because there is no support in the record that 100% of the costs associated with all common areas of the terminal building are charged to the Airlines, the Airlines have failed to show that the terminal facility fees assessed to them are unreasonable. We therefore affirm the District Court on this issue.

C. Allocation of fair share costs to General Aviation

The $2 million in fees for which the Airlines are assessed also reflects airside costs for runways, taxiways, and passenger terminal aprons. The Airport allocates these airside costs to general aviation and the Airlines. General aviation, however, is only assessed 20% of its allocated costs. General aviation should be assessed its full allocation of airside costs. The deliberate decision not to assess general aviation its full cost allocation of airside service costs discriminates against the Airlines in favor of locally owned aircraft. The Seventh Circuit, in *Indianapolis Airport*, held in a similar situation,

> The difference in the Authority's treatment of airlines and private planes—making the former pay for the full costs (and more!) that they impose on the airport, but through inaction, allowing the latter to get away with paying little more than half of the costs they impose—has not been justified. And since flights by private planes are more likely to be intrastate than airline flights are, the effect of leaving the flowage fee unchanged has been to shift some of the costs imposed by local users of the airport to its interstate users, who are, along with many of their customers, non-residents of [the state where the airport is located]. This is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act.

733 F.2d at 1271. The fact that concession revenues compensate for the underassessment does not jusify the discrimination. The concession revenues could be used to purchase improvements or additional equipment that would potentially benefit both the concessions and the Airlines. All income from the airport must ultimately be used for airport maintenance or improvement or for a new facility. Thus, failing to assess general aviation for their total costs reduces the benefits which could accrue to the Airlines from the increased revenue.

D. Crash/Fire/Rescue Charges to General Aviation

The landing fees charged to the Airlines increased from 50 cents to 70.21 cents per 1,000 lbs. of aircraft weight in 1988. Approximately 50% of this increase was due to an increase in the costs of crash/fire/rescue ("CFR") services. Provision of these services was extended over the entire 24-hour period as opposed to the 18 hours of service previously provided. The Airlines pay 100% of the CFR costs. General aviation, while receiving these services, is allocated none of the cost. The Airlines contend that these services clearly benefit general aviation, as well as terminal and parking lot tenants, and that the allocation of the CFR costs should reflect this benefit.[7]

[7] In fact, one witness testified that most of the CFR runs did not involve air carrier aircraft. Deposition of Robert M. Ross.

Any airport, in order to receive certification, must maintain CFR facilities if the airport serves air carrier aircraft with more than 30 passenger seats.[8] 49 U.S.C.A. App. § 1432(a) (West Supp.1991). The defendants assert that since the Airport would not be required to maintain CFR facilities if only general aviation aircraft used the facilities, general aviation should not share the burden of paying for the services. This position fails to account for the fact that CFR facilities are provided and maintained and service general aviation. The CFR facilities answer and service non-airline calls and rescues. These services increase the cost of maintaining and providing CFR services. If the CFR only responded to commercial airline rescue calls, then the 100% allocation would be appropriate. Charging the Airlines for 100% of the cost of CFR services where general aviation and concessionaires, such as car rental companies, receive a substantial benefit is "unreasonable" under the terms of the AHTA. The fact that the CFR services are initially provided because of regulations requiring the services for commercial airlines does not validate allocating the costs of such services only to those airlines when the service provided is adequate to cover all aircraft which use the Airport.

E. Amortization of Carrying Charges

The Airport allocated to the Airlines "carrying charges" or amortization fees for assets acquired. The defendants assumed when calculating the carrying

[8] Air carriers aircraft includes only those aircraft which are engaged in

> the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce . . . .

49 U.S.C.A. App. § 1301(24) (West Supp.1991). *See also* 14 C.F.R. § 139.3 (defining "air carrier aircraft"); 49 U.S.C.A. App. § 1301(3) (West 1976) (defining "air carrier"); 49 U.S.C.A. App. § 1301(10) (West 1976) (defining "air transportation").

charges that the capital assets were acquired with a non-existent 25 or 30 year mortgage. Such a mortgage results in interest charges in addition to the historical cost. The Airlines argue that such a charge results in the Airport recovering 2½ times the initial cost. The defendants claim that such a charge provides the Airport a reasonable return on its investment and is similar in scope to the interest charged by a financing institution. The interest rate adopted for the carrying charge is 8% and it is applied to useful life of the assets. This rate is reasonable and should not result in a net present value which exceeds the initial cost of the project.

IV.

The Airlines urge that we find any claims which are not unreasonable under the AHTA unreasonable under the laws of the State of Michigan. Since we have found that the defendants failed to allocate the proper costs to general aviation, we address only the issue of surplus revenue from concessions under Michigan law. Michigan law provides, in regard to the fees charged by the operator of a public airport,

> [The] terms, charges, rentals, and fees shall be equal and uniform for the same type of facilities provided, services rendered, or privileges granted with no discrimination between users of the same class of like facilities provided, services rendered, or privileges granted; however, the public shall not be deprived of its rightful, equal and uniform use thereof. Terms, charges, rentals and fees may vary where necessary to provide security and funds for payment of bonds to be issued as authorized for payment of bonds to be improvements to any airport, or to allow for other differing costs of financing, construction of facilities, or maintenance and operation of the facility.

Mich.Stat.Ann. § 10.233(e) [M.C.L.A. § 259.133(e)] (Callaghan 1981). The Airlines argue that because the

fees generated by the concessions generate more than is "necessary" to cover airport costs, they are contrary to state law. The Airlines cite no foundation, either in the language of the statute or in case law, which supports their position. Nothing in the statute suggests that generating revenue through charges to concessions is against Michigan law. Rather, the statute addresses nondiscrimination among similar users and considerations which may be made when setting rates. We find that the Airlines' claims that the Airport's surplus revenue is generated in violation of Michigan law to be without merit.

V.

The Airlines also submit that the Airport's fees violate the Commerce Clause because of the burden they place on interstate travel. The Supreme Court in *Evansville* established three tests to determine whether the Commerce Clause had been violated: whether fees discriminate between interstate and intrastate users, whether they approximate each user's receipt of beneficial services, and whether they are excessive in relation to the Airport's actual costs. 405 U.S. at 707, 92 S.Ct. at 1349. The Airport claims that the status of the factual record does not support this claim and that in any event the Commerce Clause is not legally applicable. We find that the District Court, relying on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), properly dismissed the Commerce Clause contention in its January 19, 1990 decision.

The Supreme Court, in *Merrion*, held that courts should only undertake a Commerce Clause review of a tax or regulation if Congress had taken no other action to regulate the area. Here, Congress has established clear guidelines for the fees and rates that may be charged commercial airlines and other public airport users. As the District Court found, where the issue before the court is the reasonableness of the fees under AHTA, the

court should only look at the consistency between the fees and Congressional policy. Thus, the District Court's dismissal of the Airlines' Commerce Clause claim was correct. The Airlines contend that the District Court's decision to dismiss the Commerce Clause claim ignores a recent Eleventh Circuit opinion, *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991). This case however involves a different type of dispute. In *Alamo*, an *off*-airport rental car company protested the imposition of a user fee of 10% of all gross receipts from the rental of cars to passengers picked up at the airport. The AHTA clearly does not cover off-airport rental car companies. Thus, Alamo was not disputing a tax or regulation in an area where Congress had acted and was therefore not barred by *Merrion* from suing under the Commerce Clause.

VI.

Accordingly, the decision of the District Court is REVERSED and REMANDED in order that the costs associated with CFR services may be properly allocated between the Airlines and general aviation. With regard to the Airlines' claim that the concessions are underassessed for their associated costs and that the Airlines are entitled to be cross-credited for surplus revenue generated by concession fees, the decision of the District Court is AFFIRMED. The majority of the court also confirms the decision of the District Court with regard to the method used to assess airside operation fees.

CONTIE, Senior Circuit Judge.

I concur in Judge Kennedy's opinion, except for Part III(C), allocation of fair share costs to General Aviation. On this issue, I write for the majority as Judge Nelson and I agree that the method the Airport used to assess airside operation fees for General Aviation and the Air-

lines was a reasonable method within the meaning of the Act.

In regard to the allocation of other costs, I agree with Judge Kennedy that the allocation of terminal rental costs between the Airlines and the concessions was reasonable, because 100% of these costs was not charged to the Airlines. In regard to crash, fire and rescue charges, I agree with Judge Kennedy that it is unreasonable to allocate 100% of these costs to the Airlines and that a remand to the district court is necessary to determine a proper allocation. Judge Nelson dissents from this position.

I will now deliver the opinion of the court with respect to Part III(C), allocation of fair share costs to General Aviation.

The Airlines argue that the Anti-Head Tax Act, 49 U.S.C. App. § 1513(a), has been violated because the Airport unreasonably charges the Airlines 100% of their airside operations costs for their use of the Airport's runways, taxiways, hangars, and passenger terminal apron, but charges General Aviation (corporate and private aircraft) only 20% of the airside operation costs, which it incurs. The Airlines argue that the Act requires that General Aviation be charged the full amount of its airside operation costs.

I do not agree. Since the shortfall in the costs incurred by General Aviation does not come out of the Airlines' pocket, but is made up instead out of concession revenues, this court has no authority to order that General Aviation must be charged 100% of its airside operation costs. The plain language of § 1513(a) of the Act applies only to persons traveling in "air commerce." The statute thus does not give the federal courts the authority to dictate how an airport should manage its business in regard to corporate and private aircraft or concessions, but indicates that a court may interfere only in regard to the reasonableness of the rates charged to commercial air-

lines. It is not unreasonable for the Airport to charge the Airlines 100% of their airside operation costs and General Aviation only 20% of its airside operation costs as long as the Airlines are not required to pay for the 80% "loss" the Airport incurs in regard to General Aviation.

In the present case, General Aviation is charged a four-cent-per-gallon fuel flowage fee and a landing fee which raises less than 20% of the landing area costs created by General Aviation. The shortfall incurred by General Aviation is made up out of the surplus revenues generated by the fees paid by the concessions. The Anti-Head Tax Act is limited in scope to the reasonableness of the rates charged to commercial aircraft operators and does not concern the revenues derived from concessions. Therefore, a federal court does not have the authority to state that instead of using concession revenues to make up the shortfall, General Aviation must be charged 100% of its airside operation costs. A discrepancy in a fee vis-a-vis different types of air carriers based on an operational cost is unrelated to the Anti-Head Tax Act's prohibition against charges on "persons traveling in air commerce." *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 170 (1st Cir. 1989). Moreover, even if General Aviation were charged 100% of its airside operation costs, the Airport reasonably could continue to charge the Airlines 100% of their airside operation costs. Thus, the demand which the Airlines make would not necessarily bring them any relief.

To reiterate, the Anti-Head Tax Act authorizes the federal courts to intervene in the setting of airports rates and charges only in the limited circumstance where the rates charged to commercial airlines are unreasonable. The decision of the Airport in the present case to charge the Airlines 100% of their airside operation costs, but to charge General Aviation only 20% of its airside operation costs, does not result in discriminatory treatment

against the Airlines, because the shortfall from General Aviation is not paid for by the Airlines but is made up out of the surplus concession revenues. This Court is in agreement that the Airlines are not entitled to a cross-credit of concession revenues. Therefore, the Airlines do not have standing to challenge what is done with the concession revenues in regard to General Aviation. The Airlines do not contend that the fees charged them for their airside operations costs are arbitrary or capricious and concede that the fees are based on the actual break-even costs calculated on the basis of aircraft weight and number of landings. Because the fees charged to the Airlines for their airside operations have a reasonable relationship to the actual costs incurred, they are reasonable within the meaning of the Anti-Head Tax Act. The decision of the district court that the method the Airport used to assess airside operations fees was a reasonable method is hereby AFFIRMED.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part.

I would affirm the judgment of the district court in its entirety. I agree with what Judge Contie has written with respect to the issues addressed in Part III(C) of Judge Kennedy's lead opinion (allocation of fair share costs to concessions and general aviation), but I am not persuaded that the airport acted unreasonably in its treatment of the cost of crash/fire/rescue services. Accordingly, I dissent from Section III(D) of the lead opinion and from the portion of the judgment that orders a remand.

In joining Judge Kennedy's opinion on the allocation of costs between the airlines and other users, I wish to add a few words on the treatment of the public spaces in the passenger terminal building. Under 49 U.S.C. App. § 1513(b), the airport is allowed to levy and collect "reasonable" rental charges from aircraft operators. The

airport has considerable leeway in determining what is reasonable, and even if the record showed that 100 percent of the amortization and operation and maintenance cost of the public spaces in the terminal was being allocated to the airlines, I would be reluctant to conclude that such an allocation was unreasonable.

It would not be unreasonable, I think, to view airline traffic as the *raison d'être* of the terminal. Professor Ferdinand Levy, a highly qualified economist, testified that "you could cut out all the concessions [through the use of satellite parking and so forth] and you could still have the airport and the airlines." (Trial transcript, pp. 993-94.) And if the fundamental purpose of the terminal is to serve the airlines and their customers, it would not be unreasonable to assign to the airlines the full break-even cost of the terminal's public spaces.

The same logic informs the district court's discussion of the assignment to the airlines of the cost of crash/fire/rescue ("CFR") services:

> "Plaintiffs argue that they should not be charged 100% of CFR expenses. This Court agrees with the *Indianapolis* court that such costs are properly allocable 100% to the airlines. 733 F.2d at 1271. The CFR costs are incurred solely because of the presence of plaintiffs and other commercial airlines at the Airport. If all the concessionaires, general aviation and fixed based operators terminated their tenancies with the Airport, the Airport would still be required to provide CFR. If all the commercial airlines ceased service at the Airport, the Airport would no longer be required to provide CFR. In addition, at trial Dean Nitz, an FAA agent, testified that it was appropriate to charge all CFR costs to the commercial airlines. Therefore, the Court finds that a charge of 100% of CFR to plaintiffs does not violate the

AHTA." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 738 F.Supp. 1112, 1119 (W.D.Mich.1990).

I agree with this analysis.

The airport's method of allocating CFR costs is not the only acceptable method, to be sure, just as its method of allocating terminal space costs is not the only acceptable method. Economists and cost accountants recognize a wide variety of different methods for assigning costs within a business that offers multiple services to multiple customers. In the absence of a statutory cost allocation formula, however, the courts have no warrant to require the use of one acceptable method in preference to another. *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589, 65 S.Ct. 829, 833, 89 L.Ed. 1206 (1945). Justice Douglas, who spoke for the Court in *Colorado Interstate Gas*, explained that

> "where as here several classes of services have a common use of the same property difficulties of separation are obvious. Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Id.* (Citation omitted.)

Cf. National Association of Greeting Card Publishers v. United States Postal Service, 462 U.S. 810, 825, 103 S.Ct. 2717, 2727, 77 L.Ed.2d 195 (1983), a unanimous opinion where the last three sentences of this passage were quoted with obvious approval.

Rate-making, including the cost-allocation component of rate-making, "is essentially a legislative function." *Colorado Interstate Gas*, 324 U.S. at 589, 65 S.Ct. at 833, citing *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1876). Where, as here, a challenged rate structure rests on essentially legislative judgments that meet the applicable statutory test, is not appropriate for the courts to substitute their judgment for the judgment of the ratemakers.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. MICHIGAN, S.D.

No. 1:88-CV-243

NORTHWEST AIRLINES, INC.; SIMMONS AIRLINES, INC.; PIEDMONT AVIATION, INC.; COMAIR, INC.; MIDWAY AIRLINES (1987), INC. formerly, FISHER BROS. AVIATION, INC.; USAIR, INC.; AMERICAN AIRLINES, INC.; and UNITED AIR LINES, INC.,

Plaintiffs,

v.

COUNTY OF KENT, MICHIGAN; THE KENT COUNTY BOARD OF AERONAUTICS; and THE KENT COUNTY DEPARTMENT OF AERONAUTICS,

Defendants.

June 18, 1990

Malcolm C. Mallette, James C. McIntire, Indianapolis, Ind., Douglas E. Wagner, Mark S. Bransdorfer, Grand Rapids, Mich., for plaintiffs.

W. Fred Hunting, Jr., Robert A. Buchanan, Mark S. Allard, Grand Rapids, Mich., for defendants.

OPINION OF THE COURT

ROBERT HOLMES BELL, District Judge.

On April 1, 1988, plaintiffs filed suit in this Court alleging that the rates charged plaintiffs by defendants

were unreasonable and in violation of federal and state law. Plaintiffs are commercial airlines which use the Kent County International Airport (Airport). Defendants are Kent County, the Kent County Department of Aeronautics and the Kent County Aeronautics Board (KCAB). The Airport is located in and owned by Kent County, Michigan. The KCAB is the arm of Kent County which manages the Airport and determines the rates to be charged the various users.

Procedural History

In their complaint and amended complaints, plaintiffs alleged that the landing fees, rental rates and aircraft parking fees set by the KCAB by resolution effective April 1, 1988 were unlawful. Plaintiffs alleged that these fees violated the Commerce Clause of the United States Constitution (U.S. Const. Art. I, § 8, cl. 3), the Anti-Head Tax Act (AHTA) (49 U.S.C.App. § 1513), the Airport and Airway Improvement Act (AAIA) (49 U.S.C. App. § 2201 et seq.) and any applicable state laws. Defendants answered by asserting that the federal statutes did not confer jurisdiction on this Court in this situation and asserting that the fees charged were reasonable. Defendants filed a counterclaim asking the Court to require plaintiffs to pay defendants the difference between what plaintiffs were paying and the new rates (Ordinance Rates). Defendants also sought a finding by this Court that plaintiffs were now month-to-month tenants. By stipulation of the parties in November 1988, the parties agreed that the plaintiffs would continue to pay the fees specified in plaintiff's most recent leases during the pendency of this matter. The parties stipulated that such interim fee payments would not serve as a waiver on the question of the reasonableness of any of the fees.

In January 1989, plaintiffs and defendants filed cross motions for summary judgment. Although plaintiff's motion asked for summary judgment on all issues, the

Court, by agreement of the parties, addressed only the issue of the legality of the rate making methodology employed by the KCAB. In an opinion and order entered June 22, 1989, the Court denied plaintiffs' motion for summary judgment finding that it could not rule that the methodology used by the KCAB in setting rates was *per se* illegal. The Court found that the methodology could be used to formulate reasonable fees.

In January 1990, the parties again filed cross motions for summary judgment. Defendants sought to have all of plaintiffs' claims dismissed on the basis that there was no federal question involved. Plaintiffs sought summary judgment on the basis that the facts were now undisputed that defendants rates were unreasonable. The Court granted partial summary judgment for defendants and denied plaintiffs' motion for summary judgment. The Court found that there was no cause of action under the Commerce Clause and that there was no private right of action under the AAIA. However, the court found that plaintiff did state a cause of action under the AHTA.

This case went to trial before the Court on February 12, 1990 on the question of whether the rates charged plaintiffs violated the AHTA. Defendants argued that the rates did not violate the AHTA and were supported by Michigan law, being M.C.L. § 259.133; M.S.A. § 10.233. The parties submitted proposed findings of fact and conclusions of law to the Court. By a preponderance of the evidence, the Court has made the findings of fact set forth in the following section of this opinion.

Background

The Court finds that the Airport has three runways. One east-west runway is a 10,000 foot runway that serves both commercial airlines and general aviation aircraft. General aviation aircraft are corporate aircraft and privately owned aircraft that are not in commercial, passenger, cargo or military service. Two of the runways are too short to serve most jet aircraft and serve general

aviation aircraft with only occasional use by commuter airline aircraft.

The Court finds that the Airport has an air passenger terminal building used by the KCAB for administrative offices, by government agencies, by plaintiffs and by a number of concession users. There is a terminal building apron in the landing area which is used by plaintiffs and on which plaintiffs' planes rest when they are at the airline gates. Airline passengers and those greeting airline passengers park in a passenger terminal building parking lot ("Parking Lot") for which they are charged. Employees of the airlines and others having business at the Airport park in an employees' parking lot without charge.

The Court finds that the Airport has extensive hangers for general aviation aircraft, together with concrete and grass parking areas for general aviation aircraft. There are three fixed base operators that service and repair general aviation aircraft. Steel Case and Amway have large corporate hangers at which they service and maintain corporate general aviation aircraft, including a 727 and two BAC-111 jet aircraft. Over 160 general aviation are based at the Airport.

The Court finds that the relationship between the Airport, plaintiffs and other nonairline concessionaires is one of landlord and tenant. This relationship manifests itself in leases entered into between the Airport and various users of the Airport. Although the Airport establishes the rates and fees to be charged to plaintiffs, the history of the parties demonstrates that the rates and fees finally incorporated in leases were determined through negotiations between the Airport and plaintiffs. This process broke down after the expiration of the last leases on January 1, 1987. Due to the inability of the parties to reach any negotiated agreement in 1987 or 1988, the KCAB implemented new rates by way of resolution on April 1, 1988 (the Ordinance Rates).

The Court finds that generally airports formulate rates and fees for airline tenants using either a compensatory or residual cost methodology. Compensatory methods base rates and fees on the actual cost of providing the particular facility and services used. Residual cost methods base the rates and fees on the total cost of operation of the airport. The essential difference between these methods is that a compensatory methodology does not take into account any interdependencies between the various airport revenue centers in establishing rates and fees. A residual cost method recognizes such interdependencies and cross credits revenues generated by one tenant among contributing tenants.

The Court finds that since 1968 the KCAB has used a compensatory methodology known as the Buckley Methodology.[1] As used by the KCAB, the Buckley method attempts to assess user fees and rental rates only for plaintiffs' use of the facilities, services, and certain other allocable operating costs (overhead, maintenance and administration). The Buckley method does not base its cost analysis on the replacement cost value or the current market value of the land or facilities. Rather, it uses the historical actual cost of the assets. The cost basis does not include taxes and does not include the cost to the Airport for various nonairline services or other tenants, such as the United States government weather service, customs office, FAA offices, the Parking Lot, various concessions (car rental, restaurant, gift shop, amusements) or the Airport motel. In addition, the KCAB deducts all state and federal funding from the cost basis. Although the Buckley method allocates costs to be recovered from general aviation and various nonairline tenants, the rate study is not used to determine

[1] This compensatory method for determining user fees and rental rates was named after James E. Buckley (d. 1981), an airport consultant, who assisted in developing the Kent County International Airport. Buckley articulated his approach in "General Principles With Respect to Airport Rate Making" (Plaintiffs' Exhibit 20).

the charges for those Airport users. The Buckley method is simply a tool used to determine the break-even costs for the airlines' use of the Airport.

The Court finds that under the Buckley methodology, plaintiffs are assessed costs in three areas: runway areas, terminal area and crash fire rescue (CFR). The costs allocated to the runway area are used to determine the landing fee and the aircraft parking fee. The terminal area costs are used to determine the rental rate to be charged. The rental rates are for space plaintiffs use in the terminal. KCAB does not charge plaintiffs for parking which is made available to plaintiffs' employees, for use of conference rooms, for the roped off space in front of plaintiffs' ticket counters, for aisle space in the concourse or for lobby spaces used by passengers. The airlines are charged 100% by CFR.

The Court finds that in 1986, the KCAB, using the Buckley method, formulated the Ordinance Rates to be effective January 1, 1987. Prior to the Ordinance Rates, plaintiffs paid rates and fees from 1984 to 1987 which were set by leases which expired on January 1, 1987 (Prior Rates). The plaintiffs challenge the legality of the Buckley method and the reasonableness of both the Prior Rates and the Ordinance Rates. In that regard, plaintiffs have proposed rates and fees which they believe are reasonable. All three rates are set forth below:

	Prior Rates	Ordinance Rates	Airlines' Proposed Rate
Landing fee (per thousand lbs)	$.50	$.70	$.138
Aircraft Parking Fee (per thousand lbs.)	$.44	$.32	N/C
Prime space, finished, heated, and air-conditioned space	$18.00 sq. ft.	$24.67/ sq. ft.	$8.34/ sq. ft.
Non-prime air-conditioned space	$11.75/ sq. ft.	$12.34/ sq. ft.	$4.17/ sq. ft.
Non-prime, unfinished, heated-not air conditioned space	$10.50/ sq. ft.	$12.34/ sq. ft.	$4.17/ sq. ft.

The Court finds that in addition to the rates and fees charged the airlines, the KCAB enters into rental agreements with other Airport tenants and charges a fuel flowage fee to general aviation aircraft. Instead of charging concessions a rate per square foot, the KCAB charges them a percentage of their gross receipts. For example, the Buckley method allocates costs of approximately $28,000 (1,120 sq. ft. × $24.67/sq. ft.) to the rental car concessions. However, the rental car companies pay the Airport 10% of their gross receipts which amounts to a payment in excess of $675,000 per year. The Buckley method does not allocate any costs to the pay telephone and advertising concessions. These concessions pay the KCAB $100,000 per year with one half of that amount deducted from the costs of the terminal. The Parking Lot is allocated costs of $688,000 but generates revenues for the Airport of approximately $1,600,000 per year. These examples show a surplus from certain concessions and the Parking Lot of approximately $1,609,000. This figure does not take into account any surplus from payments made by other concessions, itinerant general aviation (such as tie down charges), fixed base operators or hanger charges to entities such as Steel Case.

The Court finds that locally based general aviation pays a fuel flowage fee of $.04 a gallon and itinerant general aviation pays a landing fee for use of the runway. The fuel flowage fee has not changed since 1967. These fees bring revenue of less than $125,000 a year to the Airport. The Buckley method allocates costs of $650,000 to general aviation. Therefore, there is a shortfall of approximately $525,000 per year from general aviation. However, even with this shortfall, the Airport receives surplus revenue from nonairline users of more than $1,000,000 per year.

The Court finds that with regard to the rates charged to plaintiffs, the Buckley method allocates $28,000 in costs for the area set aside for overnight aircraft parking.

The actual fee charged plaintiffs for overnight parking amounts to more than $100,000 per year. The KCAB also charges the Airlines 100% of the crash fire rescue (CFR) costs.

The Court finds that the Airport has less than $2,000,000 in outstanding debt, the balance of which will be retired in 1994. At the end of 1989, the Airport had reserves of over $9,000,000.

Analysis

The basic issue before the Court is whether rates and fees charged and proposed to be charged plaintiffs by defendants are reasonable under the AHTA. Plaintiffs have the burden of proving that the rates and fees are unreasonable in light of the benefits conferred on plaintiffs. *Evansville-Vandenburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972); *American Airlines, Inc. v. Massachusetts Port Authority*, 560 F.2d 1036 (1st Cir.1977); *Raleigh-Durham Airport Authority v. Delta Airlines*, 429 F.Supp. 1069 (D.N.C. 1976); *Southern Airways, Inc. v. City of Atlanta*, 428 F.Supp. 1010 (N.D.Ga.1977).

Plaintiffs' fundamental claim is that the Buckley methodology violates the AHTA because it produces rates which are unreasonable. Plaintiff attacks the method on several grounds. Plaintiffs argue that the method is illegal because (1) it results in exorbitant profits for the Airport which far exceed the costs that the plaintiffs impose on the Airport; (2) it considers surplus concession revenues as profit and does not cross credit the surplus to plaintiffs in setting their rates and fees and (3) it discriminates against plaintiffs in favor of general aviation users. The overriding theme to plaintiffs' argument is that the rates and fees are inherently unreasonable since they generate a surplus in excess of $2,000,000 per year and have resulted in a cash surplus on hand in 1989 of over $9,000,000.

Plaintiffs maintain that in order for the Buckley compensatory method to comply with the AHTA, the KCAB must cross credit the concession revenues when establishing plaintiffs' rates and fees. This contention by plaintiff would essentially require the Airport to share the surplus revenues from nonairline users with plaintiffs. In 1973 Congress passed the Airport Development Acceleration Act ("ADAA") Pub.L. 93-44, 49 U.S.C. § 1714(a), (b), to increase federal funding of Airport development. Congress included the AHTA as part of the ADAA. Specifically the AHTA prohibited direct or indirect "head taxes" on airline passengers and overruled the holding in *Evansville-Vandenburgh Airport Authority Dist. v. Delta Airlines, supra*, which permitted airport taxes and levies on persons traveling in "air commerce." Since air travelers were subject to an 8% federal ticket excise tax, Congress intended to prohibit any similar state tax on air travelers. *See* S.Rep. No. 12, 93 Cong., 1st Sess. 1, *reprinted in* 1973 U.S.Code Cong. & Admin.News 1434, 1446. *Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 104 S.Ct 291, 78 L.Ed.2d 10 (1983); *Salem Transportation Company v. Port Authority of New York and New Jersey*, 611 F.Supp. 254, 257 (S.D.N.Y.1985).

The AHTA in part provides:

§ 1513(a)

> No State (political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons travelling in air commerce or on the carriage of persons travelling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.

§ 1513(b)

> [N]othing in this section shall prohibit a State (or political subdivision thereof . . .) . . . from levying or collecting reasonable rental charges, landing fees,

and other service charges from aircraft operators for the use of airport facilities.

The plain reading of § 1513(a) applies only to persons or the carriage of persons traveling in air commerce or the sale of air transportation or the gross receipts therefrom. The statute clearly focuses on air commerce. The Federal Aviation Act, 49 U.S.C.App. § 1301(4), (23), and (24) defines the terms: "air commerce," "interstate air commerce," and "interstate air transportation." "Air commerce" refers to "operation or navigation of aircraft"; "interstate air commerce" and "interstate air transportation" refer to "carriage by aircraft of persons or property." The statute simply does not reference nonairline concession activity. Further, § 1513(b) does permit airport authorities to "levy and collect *reasonable* rental charges, landing fees, and other service charges from *aircraft operators* for the use of airport facilities." (Emphasis supplied.) Facially, nonairline concession revenues are not within the scope of the AHTA. Accordingly, the AHTA does not support the plaintiffs insofar as they seek to require the Airport to cross credit nonairline concession revenues to plaintiffs for purposes of establishing their rates and fees. *City and County of Denver v. Continental Air Lines, Inc.*, 712 F.Supp. 834, 837-8 (D.Colo. 1989).

Historically large "hub airports" generated sufficient revenues to fund development. The legislative history of the ADAA, of which the AHTA is a part, acknowledged that airports retained and used nonairline concession revenues that exceeded expenses. Congress contemplated that profitable airports would use such funds for local airport expansion and other capital projects. *Id.* at 837. In this regard, the *Denver* Court stated:

> The legislative history of the Anti-Head Tax Act reinforces this court's conclusion that Congress did not intend it as a restriction on the collection and use of concession revenues. Nowhere in the legislative history of the Anti-Head Tax Act is there any indication that Congress intended to regulate rates charged to concessionaires, and there is no indication that Congress sought to preclude airport operators from generating surplus revenues from concessionaires to fund airport expansion and development. On the contrary, Congress recognized concession revenues as an important source of airport capital funding since federal government grant money does not finance 100% of any "airport development project."

Id. (citations omitted).

Plaintiffs argue that this Court should follow the law as set forth in *Indianapolis Airport v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir.1984) and require the Airport to cross credit concession revenues when setting plaintiffs' rates and fees. According to the facts, the Indianapolis Airport generated approximately $2.5 million in profits from charges to concessionaries. The *Indianapolis* court found the rates and fees unreasonable. However, only two of the judges based their decision on the AHTA.

Judges Posner and Coffey found that the overall rate structure violated the AHTA because the excessive fees charged concessions amounted to a head tax on the persons using the parking lot and concessions who, for the most part, were airline passengers. The Court set forth two factors which it said supported its decision. First, the Airport had a monopoly on air travel in the region. Apparently the Indianapolis Airport is the only one serviced by major airlines in that part of Indiana. There was no proof presented at trial before this Court on this issue. The Court can take judicial notice that Capitol City Airport in Lansing is served by major airlines and is only about one hour from Grand Rapids. Also, the Kalamazoo Airport, located in the Western part of Michigan is about an hour south of Grand Rapids, and is served by at least one major airline. In light of the lack of proof

and the existence of the Lansing and Kalamazoo Airports, the Court finds that the Airport in Grand Rapids is not in a monopoly situation.

The *Indianapolis* court stated that, in addition to proof of a monopoly, the airlines "must also show that this power is being used to impose unreasonable rates, directly on the airlines or airline passengers, and not on other entities that are neither formal nor actual parties to this case." *Id.* at 1267. The Court went on to state:

> Here the second critical fact comes into play, which is that the people who use the concessions at the Indianapolis airport are, with rare exceptions, airline passengers. Although some airports adjacent to large cities (the Milwaukee airport for example) have meeting facilities that attract nonpassengers, the Indianapolis airport does not. The parking lot is used by emplaning passengers and by people picking up deplaning passengers. The car rental agencies are used by emplaning and deplaning passengers, and likewise the food stands and newsstands. This means that when the airport charges a rental fee to concessionaires it is as if it were charging a landing fee to the airlines or imposing a head tax on the passengers. If a traveler is willing to pay $140 to fly from Indianapolis to (say) New York, it should be a matter of indifference to him whether he pays $100 for the ticket, $10 in head tax, and $30 for parking; or $120 for the ticket and $20 for parking, with no head tax. What matters to him is the total cost that he must incur to make the flight rather than the form in which the cost is distributed among the various items that he must buy.
>
> * * * *
>
> When concession rentals—paid ultimately by the passengers or (in the form of reduced ticket prices) the airlines—that are more than three times the cost

> that the Authority itself allocates to the concessions are added to the airline user fees that also fall on either the airlines or their passengers, the result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers, and is therefore unreasonable under the state and federal statutes.

Id. at 1267-68. The Court, therefore, invalidated the rates and fees as unreasonable but did not tell the Indianapolis Airport how to fix reasonable ones.

Judge Flaum concurred with the majority opinion but based his decision on Indiana law. Judge Flaum stated that the AHTA "does not apply to fees charged to concessionaires. The majority opinion thus has expanded the reach of the statute and created regulation of the market system where Congress clearly had no intent to regulate." *Id.* at 1274.

This Court agrees with Judge Flaum's view of the AHTA. In that regard, this Court follows *Denver, supra,* and declines to follow the *Indianapolis* case. Although this case can be factually distinguished since there is no proof presented that the Airport has a monopoly, this Court agrees with both Judge Flaum and the *Denver* court that the AHTA is inapplicable to fees charged to nonairline users of the Airport Judge Matsch in *Denver, supra*, stated:

> Persons affected by the rates, rentals and charges for the restaurants, gift shops, parking lots and rental cars, include persons who are not air passengers. These accessory uses of the airport may be considered amenities for air passengers and convenient for them, but no person traveling to, from or through Stapleton on United or Continental flights is required to park in the parking lot, rent a car, eat at a restaurant or buy a magazine. Those are all individual decisions driven by individual perceptions of need and

> economic values. That is not the case with respect to the use of the airport's runways, taxiways, and airplane portions of the terminal area. There, the air passenger is captive and her purse is necessarily and directly affected by Denver's charges to the airlines for those uses. Stated differently, Denver's decision to operate concessions at a profit is not an exploitation of airline passengers who have the freedom of choice to use the amenities Denver has provided.

712 F.Supp. at 838-39. Judge Matsch's reasoning is especially applicable at the Kent County International Airport. The Court finds that at trial, even plaintiffs' experts, Professor Horngren and Mr. Dompke, agreed that the Airport is basically an origin and destination airport. That means that most airline passengers using the Airport are either leaving from the Airport on the first leg of their journey or arriving at the Airport as the final destination of their journey. Therefore, if passengers wish to avoid concession prices, they can easily do so because there is no need for long waits at the Airport. If most of the passengers were just passing through the Airport to another destination, they would be a more "captive audience" for the Airport concessionaires. However, even then, the passengers can choose whether to use Airport concessions. The passengers cannot choose whether to use the runway, gates and airline ticket counters, however.

Therefore, the Court holds that the AHTA does not apply to rates and fees charged to nonairline users of the Airport. Accordingly, the Court will not order the Airport to share surplus generated by these users with plaintiffs.

The above analysis does not end the Court's review. Although the Court will not require the Airport to cross credit concession revenues when establishing plaintiffs'

rates and fees, the Court must review the rates and fees charged plaintiffs and determine whether they are reasonable. The Court finds that, except for the aircraft parking fee, the plaintiffs were charged the break-even costs for the areas they use. The record at trial showed that, in 1987 and 1988, the charges to the airlines equalled 43.3% and 40.6% respectively of the total airport expenses. In addition, the Airport's financial statements disclosed that the payments from the airlines have consistently been at approximately one-third of the total airport operating revenues. The rates and fees charged plaintiffs represented only 1.2% of the airlines' revenues generated at the Airport in 1988. If the Ordinance Rates had been applied, the airlines' payments would have equalled 1.5% of the revenues generated. It is clear to the Court that the Airport is charging plaintiffs only for their share of the operating expenses and is not generating any of its surplus revenues from rates and fees charged plaintiffs. Therefore, the Court finds that the Airport's charges to plaintiffs are reasonable in light of the benefits conferred on plaintiffs in exchange for the landing fees and terminal rental rates.

Plaintiffs argue that they should not be charged 100% of CFR expenses. This Court agrees with the *Indianapolis* court that such costs are properly allocable 100% to the airlines. 733 F.2d at 1271. The CFR costs are incurred solely because of the presence of plaintiffs and other commercial airlines at the Airport. If all the concessionaires, general aviation and fixed based operators terminated their tenancies with the Airport, the Airport would still be required to provide CFR. If all the commercial airlines ceased service at the Airport, the Airport would no longer be required to provide CFR. In addition, at trial Dean Nitz, an FAA agent, testified that it was appropriate to charge all CFR costs to the commercial airlines. Therefore, the Court finds that a charge of 100% of CRF to plaintiffs does not violate the AHTA.

Plaintiffs also argue that the aircraft parking fees should be eliminated since the airlines overnight their planes at gates which are already charged 100% to the airlines. Defendants argue that plaintiffs' choice to overnight at the gates is a business decision which should not prevent defendants' reimbursement of costs for the parking areas reserved by the Airport for overnight parking. The Court agrees that defendants should be reimbursed for the costs of providing the parking area. However, defendants should not be allowed to make a profit on this charge. The Court considers such a profit to be an indirect head charge and violative of the AHTA. Witnesses for both plaintiffs and defendants stated that the costs for the overnight parking area were $28,000. However, the Airport's financial statements indicate that the Airport received more than $150,000 in overnight parking charges in 1988. The Court finds this fee unreasonable and will require the Airport to recalculate this fee to result in a true break-even charge for aircraft parking.

Finally, plaintiffs argue that the undercharge to general aviation results in discrimination against plaintiffs who are interstate carriers. If the airlines were charged rates which compensated for the shortfall in general aviation fees, this Court might agree with plaintiffs. However, that is not the case. It is clear to the Court that the shortfall from general aviation users is covered by charges to concessionaires and other nonairline users of the Airport. Therefore, plaintiffs' argument must fail.

Defendants argue that, if the rates are found to be reasonable, plaintiffs must pay them the difference between the Prior Rates and the Ordinance Rates from the expiration of the prior leases on January 1, 1987. Michigan law presumes that, where a tenant holds over and the landlord accepts rent, the tenancy is continued on the same terms for another year. *Kokalis v. Whitehurst*, 334 Mich. 477, 480, 54 N.W.2d 628 (1952). However, as in *Kokalis*, no tenancy was created under the circumstances

of this case. The facts demonstrate that plaintiffs and defendants attempted to negotiate new leases but failed. That failure resulted in the KCAB imposing new rates by ordinance. These new rates were enacted by ordinance on April 1, 1988. Although these are the same rates originally proposed by defendants at the expiration of the prior leases, the Court finds that they were not a sum certain prior to April 1, 1988. Therefore, the Court will order plaintiffs to pay the KCAB the difference between the amount paid and the Ordinance Rates from April 1, 1988 to the date of the judgment to be entered by the Court with a credit to be given for the excess aircraft parking fee which has been paid. As of the date of that judgment plaintiffs must pay the KCAB at the ordinance rate as adjusted to conform the aircraft parking fee to the requirements of this opinion.

In conclusion, the Court holds that the AHTA does not require defendants to cross credit nonairline revenues when establishing rates to be charged airlines. Although the Court is troubled by such large surpluses generated by the Airport, it must acknowledge the prudent management which allows the Airport to run efficiently and with foresight thereby avoiding the necessity of seeking extra tax or bond revenues from the citizens of Kent County for expansion or improvement. The Court finds the fees charged plaintiffs to be reasonable except for the overnight parking fee which must be recalculated in accord with allocated costs.

A judgment consistent with this opinion shall issue forthwith.

JUDGMENT

In accordance with the Court's written opinion dated June 18, 1990;

The Court hereby finds for defendants on all allegations of plaintiffs' second amended complaint except for the allegation that the aircraft parking fee is unreasonable.

The Court further finds for plaintiffs on the allegation that the aircraft parking fee is unreasonable;

The Court further finds for defendants on their counterclaim;

In accordance with the findings of the Court,

IT IS ORDERED that defendants recalculate the aircraft parking fee to recover funds equal to but not greater than the costs of providing aircraft parking area;

IT IS FURTHER ORDERED that plaintiffs are to pay defendants the difference between the Prior Rates and the Ordinance Rates for the period of time from April 1, 1988 to the date of this Judgment, with an adjustment for the overpayment of the aircraft parking fee;

IT IS FURTHER ORDERED that the plaintiffs must pay the Ordinance Rates with the recalculation for the aircraft parking fee as of the date of this judgment.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. G88-243 CA

HON. ROBERT HOLMES BELL

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC., PIEDMONT AVIATION, INC., COMAIR, INC., FISCHER BROS. AVIATION, INC., d/b/a MIDWAY COMMUTER, USAIR, INC., AMERICAN AIRLINES, INC., and UNITED AIR LINES, INC.,

Plaintiffs,

v

COUNTY OF KENT, MICHIGAN, and THE KENT COUNTY AERONAUTICS BOARD,

Defendants.

OPINION OF THE COURT

Now before the Court are cross-motions for summary judgment. Defendants renew their motions for summary judgment and to dismiss claiming that there is no federal question involved and the Court does not have jurisdiction over this case. Plaintiffs renew their motion for partial summary judgment claiming that the proofs are now undisputed that the rates used by defendants are unreasonable.

The Kent County International Airport, the plaintiff Airlines, and other nonairline concessionaires are essentially related to each other as landlord and tenants. The Airport establishes rates and user fees for the Airlines and nonairline concessions. Generally, airports formulate rates and fees for airline tenants using essentially one of

two methods, either a compensatory or a residual cost method.

The Kent County Aeronautics Board (KCAB) has used a compensatory method, known as the Buckley method, since 1968. The KCAB's application of the Buckley compensatory method produced rates with which the plaintiff Airlines had apparently agreed for several terms since 1968. However, in 1986 the Airport issued a new rate study propounding rates effective January 1, 1987, which the Airlines now object to. They challenge certain landing fees, rental rates and aircraft parking fees as unreasonable. The rates and fees established in 1987 and 1984 differ significantly. The landing fee increased from \$.50 to \$.7021 per thousand pounds; the overnight parking fee decreased from \$.40 to \$.32; and the terminal space rental rates also increased.

Plaintiffs, in their Second Amended Complaint, state that defendants have violated the Commerce Clause of the United States Constitution (U.S. Const., Art. I, § 8, cl. 3), the Anti-Head Tax Act (49 U.S.C. § 1513) (AHTA), and the Airport and Airway Improvement Act (49 U.S.C. § 2210) (AAIA). Defendants claim that there is no private right of action under either of the statutes and that the Commerce Clause does not apply in this case. Defendants argue that the proper forum for this litigation is the Federal Aviation Administration (FAA).

Defendants first argue that there is no cause of action under the AHTA because the landing and rent fees are not head taxes. Although not expressly stated, defendants are in reality arguing that there is no private right of action and that any complaints by plaintiffs should be addressed to the Secretary of the Department of Transportation. In support of this position defendants cite from an amicus curiae brief from the Secretary of DOT and from *New England Legal Foundation v. Mass. Port Authority*, 883 F.2d 157 (1st Cir. 1989).

In *New England*, the court found that landing fees were not head taxes under the AHTA. This case appears to be standing alone for that proposition. The statute includes "landing fees" in those fees required to be "reasonable." 49 U.S.C. § 1513(b) states:

> (b) Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

The plain language of the statute includes landing fees in the charges that must be reasonable. If there is a private right of action under this statute, then it does not seem appropriate to say that landing fees and rental charges are somehow exempt from scrutiny. The court in *New England* did not overrule its previous ruling that there is a private right of action under the AHTA.

In *Interface Group, Inc. v. Mass. Port Authority*, 816 F.2d 9 (1st Cir. 1987), the court found that there is a private right of action under the AHTA. The court relied on the four factors found in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). After analyzing all of the factors, the court concluded that there was an implied private right of action under the AHTA. 816 F.2d at 16. In addition, to *Interface*, the court in *Niagara Frontier T.A. v. Eastern Airlines*, 658 F. Supp. 247, 250-251 (W.D.N.Y. 1987) set forth a thorough analysis of the basis for an implied private right of action using the *Cort* factors. The Court in *Rocky Mountain Airways, Inc. v. Pitkin County*, 674 F.Supp. 312 (D.Colo.

1987) also found an implied private right of action under the AHTA.

In addition to the above cases which have directly ruled on the issue of whether there is an implied right of action under the AHTA, three cases have issued rulings under the AHTA without addressing this issue. Those cases are *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984); *Island Aviation, Inc. v. Guam Airport Authority*, 562 F. Supp. 951 (D.Guam 1982); *American Airlines, Inc. v. City of Philadelphia*, 414 F. Supp. 1226 (E.D.Pa. 1976).

This Court agrees with the reasoning of the Court in *Niagara Frontier* and finds that it has jurisdiction under the Anti-Head Tax Act because the airlines have an implied private right of action under the statute.

Defendants next argue that there is no private right of action under the Airport and Airway Improvement Act. 49 U.S.C. § 2210(a)(1) states:

> As a condition precedent to approval of an airport development project, contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—
>
> (1) the airport to which the project relates will be available for public use on fair and reasonable terms and without just discrimination, including the requirement that (A) each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport and which

> utilize similar facilities, subject to reasonable classifications such as tenants or nontenants, and signatory carriers and nonsignatory carriers, and such classification or status as tenant or signatory shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on air carriers in such classification or status, . . .

The courts have consistently found no implied private right of action under the AAIA. *New England Legal Foundation, supra*, 883 F.2d at 168-70; *Interface Group, supra*, 816 F.2d at 15; *Niagara Frontier, supra*, 658 F. Supp. at 249. There are no cases in which a court found an implied private right of action under the AAIA.

In response, plaintiffs argue that, even if there is no private right of action under the AAIA, plaintiffs can use that statute as a shield under the Supremacy Clause, U.S. Const., Art. 6, cl. 2. Plaintiffs cite *Western Airlines v. Port Authority of New York and New Jersey*, 817 F.2d 222 (2d Cir. 1987) in support of this proposition. However, in that case, the court found that the local regulation was not preempted by the statute in question, 49 U.S.C. § 1305. Plaintiffs next cite *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). In that case, the Court found that Congress had completely preempted the issue of noise control in and around airports. Under the AAIA, it is clear that Congress left the determination of rates to local regulation which could be overseen by the Secretary of DOT. Finally, plaintiffs cite *Aloha Airlines, Inc. v. Hawaii*, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983). In *Aloha Airlines*, the Court found that Hawaii's tax on the gross income of the airlines was directly preempted by the section of the AHTA which prohibits taxes on gross receipts (49 U.S.C. § 1513(a)). In that case there was a direct conflict between the federal statute and the local statute. In the instant case, the statute expressly permits the local government to impose reason-

able rates on the airlines. The Court finds that there is no private cause of action under the AAIA and that that statute cannot be used as a shield under the Supremacy Clause.

Finally, defendants argue that there is no cause of action under the Interstate Commerce Clause of the U.S. Constitution because Congress has already acted under the AHTA. The United States Supreme Court has found that courts should only undertake a Commerce Clause review of a tax or regulation if Congress has not acted in the area. *Merrion v. Jicarrilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21, 40 (1982). *See, Indianapolis Airport, supra*, 733 F.2d at 1266. The court in *Indianapolis Airport* held that, where the issue was the reasonableness of the rates under the AHTA, "the only question is whether they are consistent wih the congressional policy." 733 F.2d at 1266. The Court finds that there is no Commerce Clause action stated in this case.

Plaintiffs renew their motion for summary judgment alleging that there are now sufficient undisputed facts in the record to allow the court to grant partial summary judgment to plaintiffs. Plaintiffs state that the undisputed facts presented should allow the Court to rule that the ratemaking methodology used by KCAB is improper. Defendants, of course, vociferously argue that the facts do not support plaintiffs' arguments and that there is no federal jurisdiction in this case. After reviewing the briefs and hearing oral arguments, the Court finds that the material facts are disputed and will deny plaintiffs' motion for partial summary judgment.

An order consistent with this opinion will issue forthwith.

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
United States District Judge

Dated: January 19, 1990

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

G88-243-CA

HON. ROBERT HOLMES BELL

NORTHWEST AIRLINES, INC.; SIMMONS AIRLINES, INC.; PIEDMONT AVIATION, INC.; COMAIR, INC.; MIDWAY AIRLINES (1987), INC.; formerly, FISCHER BROS. AVIATION, INC.; USAIR, INC.; AMERICAN AIRLINES, INC., and UNITED AIRLINES, INC.,

Plaintiffs,

v.

COUNTY OF KENT, MICHIGAN; THE KENT COUNTY BOARD OF AERONAUTICS; and THE KENT COUNTY DEPARTMENT OF AERONAUTICS,

Defendants.

OPINION

Before this Court are cross motions for summary judgment. Plaintiffs Airlines move for partial summary judgment on count one of their complaint seeking a declaratory judgment alleging that the rates and charges adopted by the Kent County Aeronautics Board ("KCAB") on March 10, 1988, for the Kent County International Airport ("Airport") are unreasonable, void, and unenforceable under the Anti-Head Tax Act ("AHTA"), 49 U.S.C. § 1513, and the Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. § 2210; further, the rates unreasonably burden interstate commerce violating the Commerce Clause of the United States Constitution, art. 1,

§ 8, cl. 3, and exceed rates permitted by M.C.L. § 259.133 (g). Plaintiff Airlines also move for summary judgment on defendants' counterclaim for payment of the new higher rates. Defendant Kent County ("Kent") and the KCAB move for summary judgment to dismiss plaintiff Airlines' complaint alleging the illegality of the methodology used by the KCAB to determine its rates. Pursuant to a F.R.Civ.P. 16 status conference held on October 17, 1988, the sole issue currently before this Court is whether the *methodology* used to establish user fees at the Airport is illegal, unreasonable, and void.

BACKGROUND

The Kent County International Airport, the plaintiff Airlines, and other nonairline concessionaires are essentially related to each other as landlord and tenants. The Airport establishes rental rates and user fees for the Airlines and nonairline concessions. Generally airports formulate rates and fees for *airline* tenants using essentially one of two methods, either a *compensatory* or a *residual cost* method. Compensatory methods formulate rates and fees for airline tenants based on the actual cost of the particular facility and specific service used. Residual cost methods formulate rates and fees for airline tenants based on the total cost of operation of the airport. The crucial difference between these two methods, for purposes of this analysis, is that a compensatory methodology typically ignores, and does not necessarily reflect, the practical and economic interdependencies between the various airport revenue centers in establishing rates and fees, whereas a residual cost method recognizes such interdependencies in setting rates and cross-credits revenues generated by one tenant among contributing tenants.

The KCAB has used a compensatory method known as the Buckley methodology since 1968.[1] As used by the

KCAB, the Buckley method attempts to assess user fees and rental rates only for the airline tenants' usage of the facilities, services, and certain other reasonably allocable operating costs (overhead, maintenance, and administration). The Buckley method does not base its cost analysis on the replacement cost value or the current market value of the land or facilities. Rather, it uses the historic actual cost of the assets. The cost basis does not include the cost to the Airport for various nonairline services or other tenants, such as the United States government weather service, customs offices, FAA offices, the parking lot, various concessions (car rental facilities, restaurant, gift shop, amusements), or the Airport motel. Further, the cost basis does not include taxes. However, KCAB also deducts all state and federal funding from the cost basis.

The KCAB's application of the Buckley compensatory method produced rates to which the plaintiff Airlines had agreed over several terms since 1968. However, in 1986 the Airport issued a new rate study propounding rates effective January 1, 1987, to which the Airlines now object as to both the legality of the method and the reasonableness of the resulting rates. They challenge certain landing fees, rental rates, and aircraft parking fees as unreasonable. The rates and fees established in 1987 and 1984 differ. The landing fees increased from \$.50 to \$.7021 per thousand pounds; the overnight parking fee decereased from \$.40 to \$.32; and the terminal space rental rates also increased.

Again, the issue before this Court is whether the Buckley compensatory methodology used in determining rates and fees for the Airport is illegal, unreasonable, or void. All other issues are reserved for trial.

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[1] This compensatory method for determining user fees and rental rates was named after James E. Buckley (d. 1981), an airport consultant, who assisted in developing the Kent County International Airport. Buckley articulated his approach in "General Principles With Respect to Airport Rate Making" (Defendants' Exhibit 1)

Resolution of this dispute raises several legal issues. The following analysis assumes that plaintiff Airlines have the burden to prove the unreasonableness and illegality of the Airport's compensatory method and that the fees and rates of KCAB are presumed valid. *Evansville-Vandenburgh Airport Authority Dist. v. Delta Airlines,* 405 U.S. 707, 31 L. Ed. 2d 620 (1972) *Swift v. United States,* 343 U.S. 373, 96 L. Ed. 1008 (1962); *United States v. Jones,* 336 U.S. 641, 93 L. Ed. 938 (1949); *New Orleans Public Service, Inc. v. City of New Orleans,* 281 U.S. 682, 74 L. Ed. 1115 (1930); *Southern Airways, Inc. v. City of Atlanta,* 428 F. Supp. 1010, 1020 (N.D. Ga. 1977); *Raleigh-Durham Airport Authority v. Delta Airlines,* 429 F. Supp. 1069, 1082 (D.N.C. 1976); *Patchak v. Township of Lansing,* 361 Mich. 489 (1960).

Plaintiff Airlines attack the rate method for several reasons. Fundamentally they claim that the KCAB's use of the Buckley compensatory method of rate making violates the Anti-Head Tax Act ("AHTA") because it produces rates that are unreasonable. Airlines also argue that the method is illegal because it imposes rates and fees on the Airlines, and indirectly on passengers, that result in exorbitant profits for the Airport that far exceed the costs that the Airlines impose on the Airport. Further, plaintiff Airlines contend that this method is inherently improper and unreasonable because surplus nonairline concession revenues are considered as Airport profits and not cross-credited to the Airlines in establishing their rates and fees. Also, the KCAB's application of the method discriminates against the Airlines in favor of private general aviation users. Private general aviation users are charged rates and fees less than cost attributed to them, whereas the Airlines are charged more. However, the crux of this dispute is, the Airlines state, "under the Ordinance Rates, the Airport will obtain from such sources sufficient revenue to not only pay the operating expenses and to underwrite the capital borrowing . . .

but, in 1988 will obtain an additional positive cash flow of $3,395,934." (Airlines brief filed February 9, 1988, at 26).

Plaintiff Airlines maintain that the Buckley compensatory method violates the AHTA. In 1973 Congress passed the Airport Development Acceleration Act ("ADAA") Pub. L. 93-44, 49 U.S.C. § 2210 *et seq.*, to increase federal funding of Airport development. Congress included the AHTA as part of the ADAA. Specifically the AHTA prohibited direct or indirect "head taxes" on airline passengers and overruled the holding in *Evansville-Vandenburgh Airport Authority Dist. v. Delta Airlines,* 405 U.S. 707, 31 L. Ed.2d 620 (1972), which permitted airport taxes and levies on persons travelling in "air commerce." Since air travellers were subject to an 8% federal ticket excise tax, Congress intended to prohibit any similar state tax on air travellers. *See* S. Rep. No. 12, 93 Cong., 1st Sess. 1, *reprinted in* 1973 U.S. Code Cong. & Admin. News 1434, 1446. *Aloha Airlines v. Director of Taxation of Hawaii,* 474 U.S. 7 (1983); *Salem Transportation Company v. Port Authority of New York and New Jersey,* 711 F. Supp. 254, 257 (S.D.N.Y. 1985).

The AHTA in part provides:

§ 1513(a)

> No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons travelling in air commerce or on the carriage of persons travelling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.

§ 1513(b)

> [N]othing in this section shall prohibit a State (or political subdivision thereof . . .) . . . from levying or collecting reasonable rental charges, landing fees,

and other service charges from aircraft operators for the use of airport facilities.

The plain reading of § 1513(a) applies only to persons or the carriage of persons traveling in air commerce or the sale of air transportation or the gross receipts therefrom. The statute clearly focuses on *air commerce*. The Federal Aviation Act, 49 U.S.C. § 1301(4), (23), and (24) define the terms: "air commerce," "interstate air commerce," and "interstate air transportation." "Air commerce" refers to "operation or navigation of aircraft"; "interstate air commerce" and "interstate air transportation" refer to "carriage by aircraft or persons or property." The statute simply does not reference nonairline concession activity. Further, § 1513(b) does permit airport authorities to "levy and collect *reasonable* rental charges, landing fees, and other service charges from *aircraft operators* for the use of airport facilities." Facially nonairline concession revenues are not within the scope of the AHTA. Accordingly, the AHTA does not support the Airlines insofar as they seek to require the Airport to cross credit nonairline concession revenues to the Airlines for purposes of establishing their rates and fees.

Historically large "hub airports" generated sufficient revenues to fund development. The legislative history of the ADAA, of which the AHTA is a part, acknowledged that airports retained and used nonairline concession revenues that exceeded expenses. Congress contemplated that profitable airports would use such funds for local airport expansion and other capital projects. Recognizing this, Congress even raised the percentage of federal funding to smaller airports which did not generate surplus revenues, 49 U.S.C. § 1717(a).[2] Thus, Congress implicitly approved

[2] S. Rep. No. 12, *supra*, provides, referring to hub airports: [T]he large hubs appear for the most part to be self-sustaining. In many cases these airports are actually profitable. Fees paid by the airlines for landing and for space rental and fees obtained from concessionaires for parking, restaurants, shops, etc., are adequate to cover both the operational expenses of the airport and to underwrite the capital investment borrowing required. *See also*, H.R. Rep. No. 157, 93d Cong., 1st Sess. 7 (1973).

the airports' practice of generating "surplus" airline and nonairline concession revenues. The AHTA's tacit approval of this common airport policy at least presumes its legality.

In the Airport and Airway Improvement Act of 1982 (AAIA), Pub. L. 97-248, Congress again tacitly approved the practice of airports generating at least limited "surplus" revenues by prescribing the use of such revenues for airports receiving federal project grants. Section 511 (12) of the AAIA requires airports receiving development grants to agree to use "all revenues generated by the airport . . . for the capital or operating cost of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual transportation of passengers or property."

Plaintiffs also assert that the rates and fees of the KCAB violate the Michigan Aeronautics Code (MAC). MCL § 259.133 broadly authorizes political subdivisions of the state to construct and operate aeronautical facilities, and also to determine charges, rents, and fees.[3] It does not prescribe or proscribe any particular methodology. It merely requires that fees be equal and uniform for the same type of facilities or services provided, and that the fees do not deprive the public of rightful, equal, and uniform use of the facilities. Another provision, MCL

[3] Political subdivisions may also issue revenue bonds to finance the construction of aeronautical facilities. MCL § 259.131. The powers accorded to political subdivisions is broader than that accorded to the Michigan Aeronautics Commission which establishes charges for airports run by the State of Michigan. The Commission's power is qualified by the phrase "reasonable and uniform," MCL § 259.106. This provision is similar to the Indiana Statute under which the *Indianapolis* case was decided, Ind. Code § 8-22-3-11.

§ 141.129, prohibits review by a state agency of a political subdivision's rates, charges, and fees when revenue bonds finance airport construction. This deference suggests that political subdivisions possess broad discretion in establishing rates, charges, fees, and, presumably, in selecting a rate making methodology.

Plaintiffs also claim that the Airport used the Buckley methodology to establish rates and fees that violate the Commerce Clause of the United States Constitution, art. 1, § 8, cl. 3. Under *Evansville-Vanderburgh Airport Authority, supra*, 405 U.S. 707 and *American Airlines v. Massachusetts Port Authority*, 560 F.2d 1036 (1st Cir. 1977), a rate or fee may not be "excessive in relation to costs incurred by the taxing authorities" or it may constitute an unreasonable burden on interstate commerce. Although the particular rates and fees may prove to unreasonably burden interstate commerce, the Buckley compensatory method, per se, is not readily susceptible to such evaluation under the Commerce Clause at this time.

Review of the relevant case law indicates that no single mandated methodology for establishing airport rates and fees exists. Two cases, *Raleigh-Durham, supra*, and *Indianapolis Airport, supra*, are particularly significant in analyzing this case. Although neither is binding upon this Court, the reasoning in each is instructive. In *Raleigh-Durham*, at 1079,[4] the court found:

[4] In the Raleigh-Durham case the airport operated on a compensatory or "cost of services system" in which each cost center or operating area "paid its own way." The airport had two operating areas: the "airside" and the "landside." The court described this approach as a "two cash register" system in which required the airside and landside "to support themselves independently of the profits or losses of the other. The court decided the case solely under a state statute requiring reasonable charges. The central issue in the *Raleigh-Durham* case was whether "the airport should operate under a one cash register system in which credit for landside profits . . . should be attributed to airside operations thus reducing [the airlines'] obligation for landing fees. *Supra*, 1078-79.

> [A] two cash register system . . . is a reasonable method of allocating cost and calculating airport landing fees, if it is fairly and regularly applied in all cases. This is not to say that such a method is the only reasonabe procedure for airport calculation of landing fees. Rather, it is [a] useful and reasonable tool whose proper application can produce a useful and reasonable result.

Nevertheless, in *Indianapolis Airport* the majority opinion of the court states that the multiple cash register approach used by the airport authority was an "invalid method of calculating airline landing fees."[5] The court reasons that the "vice" of the method "is that, by a combination of airline user fees and concession rentals, the airport authority has imposed on the airlines and their passengers a cost for the use of the airport that greatly exceeds a reasonable estimate of the costs that the airlines impose on the airport." However, the minority opinion criticizes the majority opinion's invalidation of the method concluding that the airport authority can recognize "as

[5] The court explains its determination:

The Authority used an invalid method of calculating airline landing fees and must therefore go back to the drawing board. But unless there were a single valid method, we could not tell the Authority what fees it must charge; and no one says there is . . . . We therefore do not hold that the Authority must use the "single cash register" approach, in which the entire airport is treated as a single cost center, rather than the "multiple such register" approach, illustrated by this case, in which the airport is divided into different revenue-producing centers each of which must pay its own way. The vice of the ordinance, at least so far as the case before us is concerned, is not that it makes airlines pay the costs allocable to them, or even that it makes concessionaires pay so much more than the costs allocable to *them* (for no concessionaires are parties to this suit); it is that, by a combination of airline user fees and concession rentals, the airport authority has imposed on the airlines and their passengers a cost for the use of the airport that greatly exceeds a reasonable estimate of the costs that the airlines impose on the airport.

many cost centers as it deems prudent; but it must allocate the costs among them, and among the users of a cost center, fairly." *Indianapolis Airport*, at 1277.

From a review of both *Indianapolis Airport* (both majority and minority opinion) and *Raleigh-Durham* it appears that the operative test of a method's validity is whether it produces reasonable rates. And the operative test of whether a rate is reasonable assesses the degree by which rates and fees for facilities and services exceed an airport's cost in providing the facilities and services (*Indianapolis Airport*) and the consistency by which a method is applied (*Raleigh-Durham*). As a general rule, it appears that the rates and fees charged to the different classes of users must reflect the Airport's costs of providing the benefits that each receives. *Indianapolis Airport*, 1270-71, 1276-77; *Raleigh-Durham*, 1079.

Further, both cases recognize the reality of economic interdependencies among airport users in assessing the reasonableness of rates and fees. However, recognition of the interdependent character of airport operations does not preclude use of a compensatory methodology or multiple cash register approach; nor does it prescribe the use of a residual methodology or single cash register approach. The standards used by these two representative cases merely require consistent application of a method that does not result in rates and fees that greatly exceed the cost to the airport of the benefit conferred. *Indianapolis Airport*, 1270-71, 1277; *Raleigh-Durham*, at 1089. For example, in a residual methodology nonairline revenues may be cross-credited to the airlines for purposes of establishing their cost basis. This practice is one technique by which an airport authority allocates to the nonairline concessions the cost to the airport of providing a flow of customers. In a compensatory methodology the allocation of cost to a nonairline concession cost center might not accurately reflect the *actual* cost to the airport authority of providing the benefit, i.e., a flow of customers

to the nonairline concession. The failure of a *rate study* to accurately and realistically assess the actual cost to the airport authority or providing the various benefits to different airport users may underestimate the actual cost to the airport in providing specific benefits to one airport user and result in rates and fees to other airport users that greatly exceed the airport's cost in providing the benefit. Thus, recognition of practical and economic interdependencies among airport users in formulating rates and fees (as required by *Raleigh-Durham* and *Indianapolis Airport*) does not require cross-crediting revenues between cost centers. However, it does require realistic determination and accurate allocation of costs.

CONCLUSION

After review of the Buckley compensatory method as presented in the brief, documents, and record of this case, this Court cannot conclude that the Buckley compensatory method, per se, is illegal, invalid, or unreasonable. The method could be used to formulate reasonable rates and fees. However, this Court also recognizes that the KCAB could misapply the method, as it may have, to formulate unreasonable rates and fees. This Court also opines that insofar the KCAB ignores the existence of interdependencies among airport users, the KCAB increases the risk of improperly formulating rates and fees that generate revenues that "greatly exceed" the Airport's legitimate costs in providing benefits (facilities, services, and capital improvements) to the Airlines.

FURTHER RESOLUTION OF THIS DISPUTE

In *Indianapolis Airport*, the court identified the role of courts in resolving disputes over airport rates and fees:

> No agency has regulatory authority over the rate practices of the Indianapolis Airport Authority; instead the duty of regulation falls to the courts in the enforcement of the state and federal statutes forbid-

> ding unreasonable rates. But this just means that we must imagine ourselves in the role of a regulatory agency . . . that is charged with preventing airport authorities from setting exorbitant rates to airlines or their passengers. [at 1268-69] . . . [T]he powers of a federal court in regulating rates are more limited than those of an administrative agency. We can invalidate an unreasonable rate, but we cannot fix the reasonable rate; that is a legislative or administrative rather than a judicial function. [at 1270] *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362, 397-98, 14 S. Ct. 1047, 1054, 38 L. Ed. 1014 (1894).

Indianapolis Airport, at 1268-70. This Court recognizes that the Airport and Airlines maintain a continuing relationship with periodic adjustment in rates and fees. This could result in recurring, rather than definitive, litigation over time to judicially determine the reasonableness of any particular rate or fee. This may well be the properly occasional role of the courts in airport rate and fee disputes. However, in the present case, assuming the limited range of judicially appropriate action as stated in *Indianapolis Airport*, a simple invalidation of the Airport's rate as unreasonable (either excessively formulated or inconsistently derived) may not even definitively resolve the current dispute. The Airport would formulate another rate and fee schedule and the Airline again could challenge it as unreasonable. This is an unhappy prospect for the district court upon which "the duty of regulation falls." The possibility of protracted and repeated judicial determinations recommends using methods of alternative dispute resolution, such as mediation, arbitration, or the appointment of a special master.

The determination of whether the Airport's rates and fees are reasonable or unreasonable in this case involves exceptional conditions for judicial analysis. Although this Court could competently determine the issue of the reasonableness of the rates and fees, the particular expertise of

a special master in evaluating these especially complicated matters of cost accounting would assist the court in arriving at a correct determination of the dispute. This Court observes that appointment of a special master is an exceptional judicial approach and in nonjury actions shall be done "only upon showing that some exceptional condition requires it." F.R.Civ.P. 53(b). Further, this Court recognizes as a requisite "exceptional condition" that resolution of this dispute involves assessment of conflicting and sophisticated cost accounting theories. To this end, this Court requires the parties to respond to this Court's proposed reference of this matter to mediation, arbitration, or a special master.

/s/ Robert Holmes Bell
HON. ROBERT HOLMES BELL
United States District Judge

Dated: June 22, 1989

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORTHWEST AIRLINES, INC.; SIMMONS AIRLINES, INC.; PIEDMONT AVIATION, INC.; COMMAIR, INC.; MIDWAY AIRLINES (1987), INC., FORMERLY KNOWN AS FISCHER BROTHERS AVIATION, INC.; UNITED AIRLINES, INC.,
Plaintiffs-Appellants,

v.

COUNTY OF KENT, MICHIGAN; THE KENT COUNTY BOARD OF AERONAUTICS; THE KENT COUNTY DEPARTMENT OF AERONAUTICS,
Defendants-Appellees.

ORDER

[Filed Apr. 16, 1992]

Before: KENNEDY and NELSON, Circuit Judges; and CONTIE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the peti-

tion were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 90-1811/2117

NORTHWEST AIRLINES, INC.

v.

COUNTY OF KENT, MICHIGAN

[Filed May 7, 1992]

Chief Judge Merritt, dissenting from failure to grant en banc hearing. The majority opinion, as Judge Nelson points out in dissent, creates a direct conflict with the Seventh Circuit on the question of allocating the costs of airport firefighting and rescue services. This is an important issue. Most major airports allocate these costs, which are substantial, to the airlines. The effect of our opinion is to hold invalid the cost allocation system at airports across the country. There is a great need for uniformity here. Before we require the Supreme Court to resolve this conflict in the circuits, we should hear the case *en banc.*

The Seventh Circuit in *Indianapolis Airport v. American Airlines*, 733 F.2d 1262, 1271 (1984), said:

> The first [of the airline's contentions] is that the ordinance should have allocated the costs of firefighting services in proportion to the number of fires experienced by each class of users of the airport's facilities over some reasonable period of time rather than mainly to the airlines. We disagree. The airport has elaborate firefighting facilities not in order to enable it to respond to a grease fire in a hamburger stand or a car fire in the parking lot but to protect the airlines and their passengers should a plane catch on fire in a crash or other accident. Airport costs that would not be avoided if a particular class of users stopped using the airport (*i.e.*, the concessionaires) are not costs imposed on the airport by those users, and therefore are not properly allocable to them. Cf. *Illinois v. ICC*, 722 F.2d 1341, 1346 (7th Cir. 1983). Thus the bulk of the firefighting costs are properly allocable to the airlines.

Our Court's opinion takes this authority away from the airports in conflict with this reasoning. This is a seriously mistaken view. As a matter of policy, most regional airports want to keep some general aviation on the field for a variety of reasons. The general aviation fleet, the number of new pilots and other similar statistics are in serious decline. Our court's decision which attempts to control the allocation of costs at such airports will make the matter worse and hasten what is already a very serious problem for the future of aviation.